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IN THE

Supreme Court of the United States

October Term, 1956

No. 931

OLA L. BRYAN, *et al.*,

Appellants,

v.

M. G. AUSTIN, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

JURISDICTIONAL STATEMENT

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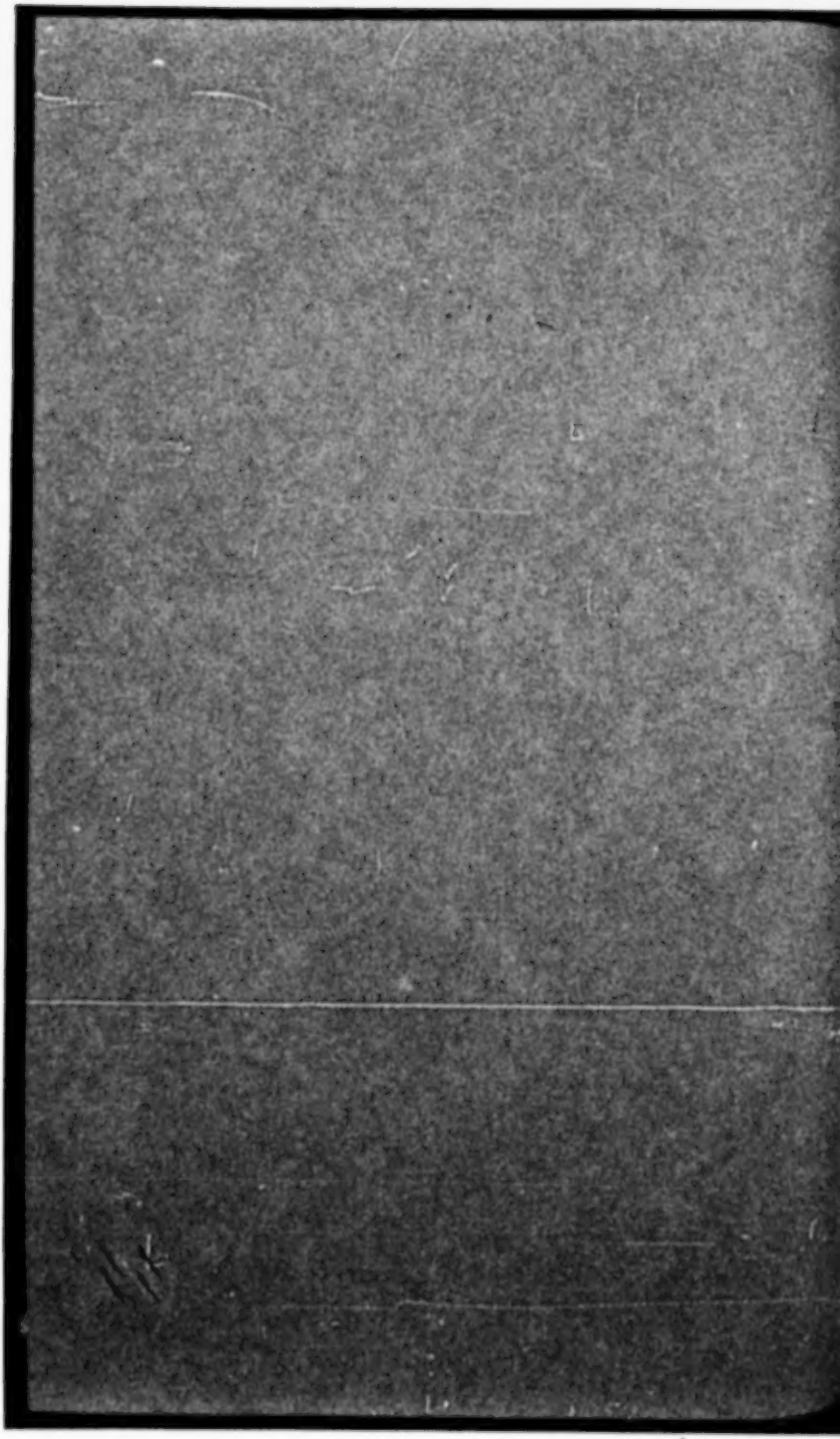

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Eastern District of South Carolina, Charleston Division, entered on January 23, 1957, which denied appellants' applications for preliminary and final injunctions to restrain the enforcement of Acts and Joint Resolutions of the General Assembly of South Carolina, 1956, No. 741 and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The opinions of Judges Williams, Timmerman and Parker, and the majority opinion in which Judges Timmerman and Williams concurred which contains the order of the court in which the latter two Judges concurred, are not yet reported and are attached hereto as Appendix A.

Jurisdiction

This suit was brought in the United States District Court for the Eastern District of South Carolina, Charleston Division, under 28 U. S. C. Section 2281-2284 to secure preliminary and final injunctions against officers of the State of South Carolina to restrain them from enforcing, on grounds of unconstitutionality, Act No. 741 of the Acts and Joint Resolutions of the General Assembly of South Carolina, 1956. The order of the District Court was entered on January 23, 1957 and Notice of Appeal was filed in that court on February 20, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. Section 1253 which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Government and Civic Employees Organizing Committee* v. *Windsor,* 347 U. S. 901, aff'g 116 F. Supp. 354 (N. D. Ala. 1953) in which the order of the three-judge court (116 F. Supp. at p. 359) was in language almost identical to that employed by the district court here. On appeal this Court exercised jurisdiction and affirmed. The exercise of jurisdiction in that case demonstrates that this Court also possesses jurisdiction here, although the affirmance merely indicates that the statute there in question, unlike the legislation involved in this case, was susceptible of a constitutional construction (116 F. Supp. at p. 357), as discussed in greater detail, *infra,* p. 11. See also *Van Dyke* v. *Geary,* 244 U. S. 39; *Eichholz* v. *P. S. C.,* 306 U. S. 268; *Chicago, B. & Q. R. Company* v. *Osborne,* 265 U. S. 14; *Henderson Water Company* v. *Corp. Comm. of N. C.,* 269 U. S. 278.

Question Presented

Whether, where appellants, Negro public school teachers, challenged a South Carolina statute unequivocally forbidding state agencies to employ members of the National Association for the Advancement of Colored People and authorizing state officials to demand of state employees oaths of non-membership in this association, on grounds of unconstitutionality under the Fourteenth Amendment's due process and equal protection clauses and as a Bill of Attainder prohibited by Article 1, Section 9, Clause 3, the District Court correctly denied injunctive relief restraining the statute's enforcement, relegating plaintiffs to inherently ineffectual "administrative remedies" and to state courts for a determination of the statute's constitutionality.

Statutes Involved

Act No. 741 of the Acts and Resolutions of the General Assembly of South Carolina, 1956; Code of South Carolina 1952, Section 21-103, reprinted herein in Appendix B.

Statement

The principal facts are related succinctly in the opinion of Judge Williams:

> There is no dispute as to the facts. Plaintiffs are seventeen Negro school teachers, who had been employed in Elloree Training School of School District No. 7 of Orangeburg County, South Carolina, prior to June 1956 for varying periods of time, one for as long as ten years. There is evidence to the effect that they were competent teachers and there is no evidence that their service was unsatisfactory in any way. In March 1956 the Legislature of South Carolina passed the act here complained of [Act No. 741, reprinted in full in Appendix B], one of the provisions of which authorized the board of trustees of any school to demand of any teacher that he submit

a statement under oath as to whether or not he was a member of the National Association for the Advancement of Colored People, and provided that anyone refusing to submit such statement should be summarily dismissed. Other sections of the act made it unlawful for any member of that association to be employed by any school district and imposed a fine of $100 for employing any individual contrary to the provisions of the Act. When plaintiffs in May of 1956 were given blank applications [set forth in this Appendix C] by the School Superintendent to be filled out and sworn to, which contained questions as to their membership in the Association and their views as to the desirability of segregation in the schools, they declined to answer these questions. Only one of the plaintiffs, however, was a member of the Association. Upon being told that they would have to fill in the answers or tender their resignations, they chose the latter course and were not elected as teachers for the ensuing year. (R. 90-91, App. pp. 2a-3a).

On September 12, 1956, appellants commenced action for interlocutory and permanent injunctions to restrain the enforcement of Act No. 741. In their complaint plaintiffs alleged that the statute in question was unconstitutional in that it violated Fourteenth Amendment guarantees against state denial of freedom of speech and assembly (R. 9) and in that it was a bill of attainder (R. 9). Because plaintiffs sought to enjoin state officers in the enforcement of a statute of state wide application a three-judge court consisting of Chief Judge John J. Parker, District Judges George Bell Timmerman and Ashton H. Williams, was convened as provided by 28 U. S. C., Sections 2281-2284. Complete testimony was taken, argument had, and thereafter, briefs submitted.

Each member of the District Court wrote a separate opinion although Judge Timmerman, disagreeing with Judge Williams' position, concurred in it (R. 112, App. p. 28a) to create a majority in support of the order actually issued (R. 125, App. p. 42a). Judge Williams was of the

opinion that the three-judge district court had jurisdiction, but "[t]o declare an act of the state legislature unconstitutional should be left to the state court" (R. 96, App. p. 8a). He therefore wrote that "[t]he case should not be dismissed but should be retained and remain pending to permit the plaintiffs a reasonable time for the exhaustion of state administrative and judicial remedies as may be available. . . ." (R. 97, App. 9a).

Judge Timmerman was of the opinion that the three-judge district court did not have jurisdiction because he believed that the statute in question had not been applied to the plaintiffs (R. 102, App. p. 18a). Moreover, in his view the statute in question was entirely constitutional (R. 107, App. p. 21a).

Judge Parker, agreeing with Judge Williams as to jurisdiction, but dissenting as to the majority's disposition of the case, was of the opinion that on the law and the uncontradicted evidence the statute in question was unconstitutional and that the requested relief should have been granted (R. 124, App. p. 41a). He believed that no construction of the statute in question could render it constitutional (R. 114, App. p. 30a) (therefore there was no reason to remand to the state court), that the so-called administrative remedy conferred by the statute was judicial, and need not have been exhausted under *Lane* v. *Wilson*, 307 U. S. 268, and that no administrative remedy could cure the basic defect of unconstitutionality (R. 123, App. pp. 40a-41a), (therefore, there was no reason to remand to state administrative tribunals).

The Questions Are Substantial

1. Act No. 741 destroys free speech

The legislation in question is a patent attempt to destroy rights of free speech and association and flies squarely in the face of the prior decisions of this Court. The statute complained of is, in the words of Chief Judge Parker, "unambiguous and clearly unconstitutional" (R.

124, App. p. 41a). The right to belong to a lawful association is one of those rights of expression and conscience secured by the First Amendment and incorporated into the Fourteenth. *Wieman* v. *Updegraff*, 344 U. S. 183; *Thomas* v. *Collins*, 323 U. S. 516; *DeJonge* v. *Oregon*, 299 U. S. 353. Such constitutional rights may not be taken away directly nor may the enjoyment of a legal privilege, in this case public employment, be conditioned upon their abandonment. As to public employment see: *Slochower* v. *Board of Education of N. Y.*, 350 U. S. 551, 555; *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Alston* v. *School Board of City of Norfolk*, 112 F. 2d 992, 997 (4th Cir., 1940), cert. denied, 311 U. S. 693. As to other constitutional rights see: *Frost* v. *Railroad Commission*, 271 U. S. 583 (use of public highways); *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (right to do business within state); *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494 (same); *Southern Pacific* v. *Denton*, 146 U. S. 202 (same).[1]

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[1] Plaintiffs, of course, have standing to raise the question of the constitutionality of the statute, for in the words of Judge Parker (R. 120, App. p. 38a):

> ". . . one of them is a member of the Association and all have been denied employment because of their refusal to answer the questions as to membership in that organization. The school authorities may, of course, make inquiries of prospective teachers as to matters bearing upon their character and fitness to teach; but this is a very different thing from making inquiry as to membership in an organization which they have a right to join but membership in which, under state law, bars them of the right of employment. Just as they have a right not to be denied employment because of such membership, they have a right not to be denied employment for refusal to make oath with regard to the matter. What was required of them was not merely answers to questions but the filing of a sworn statement. This was requiring of them a 'test oath' relating to membership as a condition of employment which was clearly an invasion of their constitutional rights as held in Wieman v. Updegraff, supra.
>
> "It is argued that plaintiffs are no longer employed by defendants and that they have no applications for positions pending which could be adversely affected by the statute. This is to take too narrow a view of the rights of plaintiffs, who are public

2. Act No. 741 denies equal protection of the laws

Moreover, Act 741 is obviously unconstitutional in the light of decisions of this Court interpreting the equal protection clause of the Fourteenth Amendment. To meet the test of that clause state legislation must make only reasonable distinctions reasonably related to a valid legislative purpose. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562; *Skinner* v. *Oklahoma,* 316 U. S. 535. The ultimate purpose of Act No. 741 fully discussed *infra,* pp. 8-9, is to prevent the full enjoyment of equal protection of the laws in public education. A more immediate purpose is to stifle discussion of the segregation issue. Both ends are illegal. But even if the statute's purpose were something else, Act. No. 741 is invalid in that it is not based upon a real and substantial difference. As a "constitutionally suspect" statute, *Bolling* v. *Sharpe,* 347 U. S. 497, 499, and one lacking the momentum for respect accorded other regulations, *Kovacs* v. *Cooper,* 336 U. S. 77, 90-94, *Thomas* v. *Collins,* 323 U. S. 516, 530, no valid justification has been made to support its having singled out membership in this organization.

3. Act No. 741 is a bill of attainder

Moreover, the statute in question is a bill of attainder, a legislative act which inflicts punishment without judicial trial. *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *United States* v. *Lovett,* 328 U. S. 303. Members of the National Association for the Advancement

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school teachers by profession whose rights are invaded by the statute and the inquiries to which they have been subjected thereunder. They are seeking here a declaration as to their rights in a suit instituted against representatives of the state charged with the enforcement of the statute in the locality in which they reside, in which the provisions of the statute have been enforced against them, in which they desire to teach and in which they would naturally seek employment as teachers in the future." See also Alston v. School Board of Norfolk, 112 F. 2d 992, 997 (4th Cir., 1940), cert. denied, 311 U. S. 693.

of Colored People are, as set forth in these cases, "easily ascertainable members of a group", *United States* v. *Lovett*, 328 U. S. 303, 315-316. The fact that the proscription is in the form of an oath does not save it, *Cummings* v. *Missouri, supra.* Deprival of public employment is "punishment" within the meaning of the constitutional prohibition of bills of attainder, *United States* v. *Lovett, supra.*

4. Act No. 741 would destroy the liberty to advocate school desegregation

This case therefore presents another facet of the attack mounted by certain states upon this Court's decision in *Brown* v. *Board of Education*, 349 U. S. 294. Like other states[2] South Carolina, whose legislation is

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[2] As to interposition and nullification: Senate Concurrent Resolution No. 17-XX, Special Session, 1956, of the Florida Legislature, 1 Race Rel. L. Rep. 948 (1956); House Resolution No. 185, Regular Session, 1956, of the Georgia General Assembly, 1 Race Rel. L. Rep. 438 (1956); House Concurrent Resolution No. 10, Regular Session, 1956, of the Louisiana Legislature, 1 Race Rel. L. Rep. 753 (1956); Senate Concurrent Resolution No. 125, Regular Session, 1956, of the Mississippi Legislature, 1 Race Rel. L. Rep. 440 (1956); House Resolution No. 1, Tennessee General Assembly, 1957, 2 Race Rel. L. Rep. 228 (1957); Senate Joint Resolution No. 3, 1956 Session of the Virginia Legislature, 1 Race Rel. L. Rep. 445 (1956).

As to other attempts at circumvention:

Florida: Ch. 29746 (1955), 1 Race Rel. L. Rep. 237 (1956); Chs. 31380, 31389, 31390, 31391 (1956), 1 Race Rel. L. Rep. 924, 954, 955, 940 (1956).

Georgia: Appropriation Act §§ 7-8, Acts 11, 12, 13, 15, 197 (1956), 1 Race Rel. L. Rep. 421, 418, 426, 420, 424, 450 (1956).

Louisiana: Const. Art. XII, § 1, La. R. S. 17:331-334, La. R. S. 17.81.1, 1 Race Rel. L. Rep. 239 (1956), held unconstitutional in Bush v. Orleans Parish School Board, 138 F. Supp. 336, 337 (E. D. La. 1956), motion for leave to file petition for writ of mandamus denied, 351 U. S. 948 (1956), aff'd — F. 2d — (5th Cir. decided March 1, 1957); La. R. S. 17:2131-2135, La. R. S. 17:443, 1 Race Rel. L. Rep. 730, 941 (1956) now declared unconstitutional in Ludley v. Board of Supervisors of L. S. U. and Agricultural and mechanical College, etc., — F. Supp. — (E. D., La.), decided April 16, 1957; Acts 28, 248,

involved in this case, has enacted statutes of nullification and interposition[3] and other legislation[4] designed to inhibit Negroes seeking school desegregation. South Carolina would deny freedom of speech and assembly in order to achieve its goal, and in this case has taken the extraordinary step of conditioning the exercise of the privilege of public employment upon abandonment of the

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250, 252, Senate Bill 350, Const. Art. XIX, § 26, 1 Race Rel. L. Rep. 728, 943, 944, 942, 927, 776 (1956); House Concurrent Resolution No. 9, 1956 Session, 1 Race Rel. L. Rep. 755 (1956).

Mississippi: House Concurrent Resolution No. 21, Regular Session 1956, 1 Race Rel. L. Rep. 423 (1956); Proposed House Bill No. 30, Regular Session, 1956 (vetoed by Governor), 1 Race Rel. L. Rep. 448 (1956); House Bills No. 31, 119, 880 (1956), 1 Race Rel. L. Rep. 422, 449, 592 (1956).

North Carolina: Chs. 1-7, 1956 Extra Session, 1 Race Rel. L. Rep. 928-940 (1956); Act 336, 1955, 1 Race Rel. L. Rep. 240 (1956), see Carson v. Board of Education of McDowell County, 227 F. 2d 789 (4th Cir., 1955) and Carson v. Warlick, 238 F. 2d 724 (4th Cir., 1956), cert. den. — U. S. —, 1 L. ed. 2d 664.

Tennessee: Chs. 9, 10, 11, 12, 13 Laws of Tennessee (1957), 2 Race Rel. L. Rep. 220, 222, 215, 220, 215.

Virginia: Ch. 70, Extra Session 1956, 1 Race Rel. L. Rep. 1109 (1956) held unconstitutional in Adkins v. The School Board of the City of Newport News, 148 F. Supp. 430 (E. D. Va., 1957); Chs. 56-71 (1956), 1 Race Rel. L. Rep. 1091-1111 (1956).

[3] Act of February 14, 1956, Calendar No. S. 514 of the South Carolina Legislature, 1 Race Rel. L. Rep. 443 (1956).

[4] Act 329 (1955), 1 Race Rel. L. Rep. 241 (1956) (appropriations for operation of a public school system shall cease for a school from which, and for a school to which, any pupil may transfer pursuant to order of court). Acts of 1956: 662 (providing administrative remedies for those aggrieved by school assignment); 676 (providing that boards of trustees of school districts may prescribe rules and regulations); 677 (making similar provision for county boards of education); 712 (authorizing sheriffs to remove children from schools); 813, § 3 (restricting expenditures of funds to institutions of higher learning where racial integration is not practiced). 1 Race Rel. L. Rep. 586, 588, 730, 731.

constitutional right of free speech and assembly—in this case the right to belong to a lawful organization, the National Association for the Advancement of Colored People, well-known as the principal organization opposed to racial segregation.[5] It is manifestly of substantial importance that such a legislative maneuver which flatly denies free speech and assembly for the purpose of insulating unconstitutional segregation from attack be reviewed and condemned by this Court.

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[5] "Private Attorneys-General: Group Action in the Fight for Civil Liberties," 58 Yale L. J. 574 (1949); Ashmore, The Negro and the Schools 30, 35, 38, 73, 97, 124, 131 (1954); Williams and Ryan, Schools in Transition 38-39, 52, 55, 60, 71, 73, 79, 92, 96-106, 127, 130, 137, 139, 161, 179, 182, 202, 222, 224 (1954); Woodward, The Strange Career of Jim Crow 110-111 (1955); Rose, The Negro in America 242, 259, 263-267 (1956 ed.); Robison, "Organizations Promoting Civil Rights and Liberties", 275 Annals 18, 20 (1951).

Other states opposed to desegregation have attacked this organization in different ways:

Arkansas: Laws of 1957, Acts Nos. 83, 84, 85.

Georgia: Williams v. National Association for the Advancement of Colored People, Inc., unreported, No. A-58654 (Sup. Ct. Fulton County).

Louisiana: Louisiana ex rel. LeBlanc v. Lewis, unreported, No. 55899 (D. C., 19th Jud. Dist.), app. dismissed *sub nom.* Louisiana ex rel. Gremillion v. National Association for the Advancement of Colored People, Inc., unreported (La. App. First Cir.) "since the cause was removed to the United States District Court, Eastern District of Louisiana, on March 28, 1956 [No. 1678] * * *," 1 Race Rel. L. Rep. 571, 576 (1956).

Mississippi: House Bill No. 33, Regular Session 1956, 1 Race Rel. L. Rep. 451 (1956).

Tennessee: Public Chapter Nos. 104, 151, 152 (1957).

Texas: Texas v. N. A. A. C. P., Inc. (and N. A. A. C. P. Legal Defense and Educational Fund, Inc.).

Virginia: Chs 31-37 Extra Session 1956; Ordinance adopted by Board of Supervisors of Halifax County, August 6, 1956, 1 Race Rel. L. Rep. 958 (1956).

5. Appellants should not have been remitted to state courts

The trial court was patently wrong in relegating plaintiffs to the state court on the ground that "to declare an act of the state legislature unconstitutional should be left to the state court." (R. 96, App. p. 8a). Judge Williams relied upon this Court's decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496 and cited other cases in the same vein, *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Albertson Millard*, 345 U. S. 242; *Government and Civic Employees Organizing Committee, CIO et al.* v. *Windsor*, 347 U. S. 901. The majority interprets these decisions as requiring state courts to pass first upon cases involving the constitutionality of state legislation. However, those cases hardly stand for such a proposition. As was pointed out in *Alabama Public Service Commission* v. *Southern Railroad Company*, 341 U. S. 341, 344 (1951), proceedings in a federal trial court should be stayed only where there is involved "construction of a state statute so ill defined that a federal court should hold the case pending a definitive construction of that statute in the state courts." Indeed in *Toomer* v. *Witsell*, 334 U. S. 385, in which the district court had upheld the constitutionality of a state statute this court reversed without staying proceedings for action by the state courts. In *Government and Civic Employees Organizing Committee, CIO et al.* v. *Windsor*, 116 F. Supp. 354, 357 (N. D. Ala. 1953) aff'd 347 U. S. 901, it was held in the trial court that "the Act [in question] could be construed by the state courts simply as prohibiting a public employee from being a member of or participating in such an organization for the purpose of collective bargaining with the State and as so construed, meet the challenge of unconstitutionality."

The purpose and effect of Act No. 741 are unquestionable. It contains no ambiguity which could affect its applicability or constitutionality. Judge Williams in making his ruling assumed that the meaning of the statute was "clear and unequivocal." (R. 96, App. p. 8a). None of the counsel

for the defendants nor the Attorney General of the State of South Carolina have suggested a construction of this statute which could render it constitutional.

Judge Parker wrote below:

> "... The rule as to stay of proceedings pending interpretation of a state statute by the courts of the state can have no application to a case, such as we have here, where the meaning of the statute is perfectly clear and where no interpretation which could possibly be placed upon it by the Supreme Court of the state could render it constitutional." (R. 114, App. p. 30a).

As was held in *Propper* v. *Clark*, 337 U. S. 472, 492:

> "The submission of special issues is a useful device in judicial administration in such circumstances as existed in the Magnolia Case, 309 US 478, 84 L ed 876, 60 S Ct 628, 42 Am Bankr NS 216; Spector Case, 323 US 101, 89 L ed 101, 65 S Ct 152; Fieldcrest Case, 316 US 168, 86 L ed 1355, 62 S Ct 986, and the Pullman Case, 312 US 496, 85 L ed 971, 61 S Ct 643, all supra, but in the absence of special circumstances, 320 US at 236, 237, 88 L ed 14, 15, 64 S Ct 7, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy.
>
> "We reject the suggestion that a decision in this case in the federal courts should be delayed until the courts of New York have settled the issue of state law."

See also, *Public Utilities Comm.* v. *United Fuel Gas Company*, 317 U. S. 456, 468-469; *Romero* v. *Weakley*, 226 F. 2d 399 (9th Cir., 1955); Cf. *Hillsboro Township* v. *Cromwell*, 326 U. S. 620, 628-9.

6. Appellants should not have been relegated to so-called administrative remedies

Moreover, there was absolutely no justification for the court below to have remitted plaintiff to a so-called administrative remedy. It will be noted that the court's order does not state what this "administrative remedy" is. Section 3 of Act No. 741 (App. p. 46a) perhaps purports to confer an administrative remedy, but mere inspection of this provision indicates that it remits plaintiffs to the circuit courts of the state. This is a judicial remedy and not administrative and clearly need not be exhausted. *Lane* v. *Wilson*, 307 U. S. 268.[6]

7. The District Court abused its discretion

The court below manifestly abused its discretion in remitting plaintiffs to state judicial and administrative remedies and in not entering the relief requested on the uncontradicted facts and the clear requirements of the

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[6] It was suggested by defendants in the court below that elsewhere in the statutes of South Carolina there is an administrative remedy, with particular reference to Code of 1952, Section 21-103 (Appendix B, p. 47a). Act No. 741 was passed subsequent to Section 21-103 and presumably supersedes it. As Act No. 741 is specifically applicable to this case it would appear that plaintiffs have only a state judicial remedy which need not be exhausted under *Lane* v. *Wilson*, 307 U. S. 268. But in any event there is no issue in this case as to the construction or administration of the school laws which is the scope of review under 21-103. The only issue is one of constitutionality which the county board is powerless to adjudicate as Judge Parker points out. A board perhaps could find that plaintiffs had actually answered the questionnaire in full or that plaintiff Fulton (R. 86-87) was not a member of the National Association for the Advancement of Colored People, but such findings would be absurd, for this entire proceeding is based upon the fact that plaintiffs had not filled out the questionnaire and that plaintiff Fulton is a member of the National Association for the Advancement of Colored People. It would be futile for plaintiffs to go to a board without authority to render the relief they require. Montana National Bank v. Yellowstone County, 276 U. S. 499; Waite v. Macy, 246 U. S. 606; United States Alkali Export Ass'n v. United States, 325 U. S. 196.

United States Constitution. It is an abuse of discretion for a court to enter an interlocutory injunction when there is evident want of jurisdiction, *United States* v. *Corrick*, 298 U. S. 435. Since, as Judge Parker pointed out below, a court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given", citing *Cohens* v. *Virginia*, 6 Wheaton 264, 404, in this case it was an abuse of discretion not to exercise jurisdiction. The exercise of discretion "implies conscientious judgment, not arbitrary action." *Burns* v. *United States*, 287 U. S. 216, 222-223, and as Mr. Justice Brandeis has written, "does not extend to a refusal to apply well-settled principles of law to a conceded state of facts", *Union Tool Company* v. *Wilson*, 259 U. S. 107, 112. As on the uncontradicted facts and the clear law the statute involved is patently unconstitutional and as there was absolutely no justification in remitting plaintiff to state courts and to non-defined so-called administrative remedies, a preliminary injunction should have been entered. As full testimony had been taken, argument had and briefs submitted, the preliminary injunction should have also been made final.

We believe therefore that the questions presented by the appeal are substantial and that they are of public importance.

Respectfully submitted,

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Appendix A

(Opinion of United States District Court, Eastern District of South Carolina)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 5792

OLA L. BRYAN, ESSIE M. DAVID, CHARLES E. DAVIS, ROSA D. DAVIS, VIVIAN V. FLOYD, BEE A. FOGAN, HATTIE M. FULTON, RUTHA M. INGRAM, MARY E. JACKSON, FRAZIER H. KEITT, LUTHER LUCAS, JAMES B. MAYS, LAURA PICKETT, HOWARD W. SHEPTON, BETTY SMITH, LEILA M. SUMMER and CLARENCE V. TOBIN,

Plaintiffs,

versus

M. G. AUSTIN, JR., as Superintendent of School District No. 7, of Orangeburg County, the State of South Carolina, and W. B. BOOKHART, HAROLD FELDER, T. T. McEACHERN, ELMO SHULER and ULMER WEEKS, as the Board of Trustees of School District No. 7, of Orangeburg County, the State of South Carolina,

Defendants.

On Application for Injunction.

(Argued October 22, 1956. Decided Jan. 22, 1957.)

Before:

PARKER, *Circuit Judge,* and TIMMERMAN and WILLIAMS, *District Judges.*

Appendix A

LINCOLN C. JENKINS, JR., THURGOOD MARSHALL and JACK GREENBERG, Attorneys for Plaintiffs;

A. J. HYDRICK, JR., MARSHALL WILLIAMS, ROBERT McC. FIGG, JR., P. H. McEACHIN, D. W. ROBINSON, T. C. CALLISON, Attorney General of South Carolina and DANIEL R. McLEOD and JAMES S. VERNER, Assistant Attorneys General of South Carolina, for defendants.

WILLIAMS, *District Judge*:

This is an action by Negro school teachers against the School Superintendent and the Board of Trustees of a school district in South Carolina. Its purpose is to obtain a declaratory judgment that the South Carolina statute making unlawful the employment by the state, or by a school district of the state, of any member of the National Association for the Advancement of Colored People is unconstitutional and void and to enjoin the enforcement of the statute in violation of their constitutional rights. As the defendants are engaged in the enforcement of a statute of state wide application and injunction is asked against them, a court of three judges is appropriate for the hearing of the case. *City of Cleveland* v. *United States*, 323 U. S. 329. Such a court has accordingly been convened, the parties have been heard, the Attorney General of the State has been heard orally and by brief, and the parties after the hearing have been allowed to file additional briefs, which have been received and considered.

There is no dispute as to the facts. Plaintiffs are seventeen Negro school teachers, who had been employed in Elloree Training School of School District No. 7 of Orangeburg County, South Carolina, prior to June 1956 for varying periods of time, one for as long as ten years. There is evidence to the effect that they were competent teachers and there is no evidence that their service was unsatis-

factory in any way. In March 1956 the Legislature of South Carolina passed the act here complained of, one of the provisions of which authorized the board of trustees of any school to demand of any teacher that he submit a statement under oath as to whether or not he was a member of the National Association for Advancement of Colored People, and provided that anyone refusing to submit such statement should be summarily dismissed. Other sections of the act made it unlawful for any member of that association to be employed by any school district and imposed a fine of $100 for employing any individual contrary to the provisions of the Act. When plaintiffs in May of 1956 were given blank applications by the School Superintendent to be filled out and sworn to, which contained questions as to their membership in the Association and their views as to the desirability of segregation in the schools, they declined to answer these questions. Only one of the plaintiffs, however, was a member of the Association. Upon being told that they would have to fill in the answers or tender their resignations, they chose the latter course and were not elected as teachers for the ensuing year. Three questions are presented by the case: (1) Is the statute unconstitutional as plaintiffs contend? (2) Are plaintiffs in position to raise the question as to its unconstitutionality? And (3) Can the court grant plaintiffs any relief in view of the fact that plaintiffs have resigned as teachers and others have been elected to their places?

We think we should use our discretion in refusing to pass on the issues in this controversy at this time. It does not appear that the statute in question has been interpreted by a state court, and it is not proper to pass upon the controversy presented herein until a South Carolina court has first heard the case and passed upon the constitutionality of the Act in question.

In 1941 the United States Supreme Court had before it the case of *Railroad Commission of Texas* v. *Pullman Co.*,

312 U. S. 496. This case involved a regulation by a state commission authorized by statute, and it was contended that the regulation was in violation of the Equal Protection, the Due Process and the Commerce Clauses of the Constitution. The United States Supreme Court had the following statement to make with reference to the three-judge District Court's decision which enjoined the enforcement of the regulation:

> "• • • But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn* v. *Field Packing Co.*, 290 U. S. 177; *Lee* v. *Bickell*, 292 U. S. 415. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

• • •

In the case of *American Federation of Labor* v. *Watson*, 327 U. S. 582, 66 S. Ct. 761, 90 L. ed. 873, the Court held that the bill had equity, but the trial court erred in adjudicating the merits of the controversy, saying:

> "• • • The crux of the matter is the allegation that there is an imminent threat to an entire system

of collective bargaining, a threat which, if carried through, will have repercussions on the relationship between capital and labor as to cause irreparable damage. We conclude for that reason that the bill states a cause of action in equity.

"As we have said, the District Court passed on the merits of the controversy. In doing so at this stage of the litigation, we think it did not follow the proper course. The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation." 327 U. S. at pages 595-596, 66 S. Ct. at page 767.

• • •

Plaintiffs in this case claim that the act in question is so clear that it should be construed by us and that we should decide all of the issues. In the case of *Albertson* v. *Millard*, 345 U. S. 242, the issues were equally clear and free from ambiguity. The appellants challenged the definitions in the act as being void for vagueness. Mr. Justice Douglas in a dissenting opinion said:

"• • • There are no ambiguities involving these appellants. The constitutional questions do not turn on any niceties in the interpretation of the Michigan law. The case is therefore unlike *Rescue Army* v.

Municipal Court, 331 U. S. 549, and its forebears where the nature of the constitutional issue would depend on the manner in which uncertain and ambiguous state statutes were construed. See especially ***A. F. of L.*** v. ***Watson,*** 327 U. S. 582, 598. Here there are but two questions:

"(1) Can Michigan require the Communist Party of Michigan and its Executive Secretary to register?

"(2) Can Michigan forbid the name of any Communist or of any nominee of the Communist Party to be printed on the ballot in any primary or general election in the state?"

However, the opinion of the Court in this case states:

"We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action. See ***Rescue Army*** v. ***Municipal Court,*** 331 U. S. 549 (1947); ***American Federation of Labor*** v. ***Watson,*** 327 U. S. 582 (1946); and ***Spector Motor Service*** v. ***McLaughlin,*** 323 U. S. 101 (1944).

"The judgment is vacated and the cause remanded to the District Court for the Eastern District of Michigan with directions to vacate the restraining order it issued and to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts either in pending litigation or other litigation which may be instituted."

The case of ***Government and Civic Employees Organizing Committee, CIO, et al.*** v. ***Windsor, et al.,*** 116 F. Supp. 354, affirmed in a ***per curiam*** decision without opinion, 347 U. S. 901, is even stronger than the ***Albertson*** case ***supra.***

Appendix A

This case involved a statute prohibiting state public employees from belonging to labor unions or organizations and provided for forfeiture of certain rights of those who joined a labor union or organization. The statute was clear and free from ambiguity. Plaintiffs there took the same position as the plaintiffs in the case at bar as indicated in the district court's opinion at page 357:

> "Plaintiffs contend that the challenged statute is self-executing and that it lends itself to no possible construction other than that of unconstitutionality under the Due Process Clause of the Fourteenth Amendment. They insist that they do not have to wait longer before seeking relief in a federal court, because they think that 'Alabama's Legislature has used unmistakably simple, clear, and mandatory language' and that 'there is neither need for interpretation of the statute nor any other special circumstance requiring the federal court to stay action pending proceedings in the State courts.' *Toomer* v. *Witsell*, 334 U. S. 385, 392, 68 S. Ct. 1156, 1160, 90 L. Ed. 1460. The defendants assert among other grounds that plaintiffs have not exhausted available state administrative and judicial remedies and that consequently this court, as a matter of sound, equitable discretion, should decline to exercise jurisdiction.
>
> • • •
>
> "The exercise of jurisdiction under the Federal Declaratory Judgment Act is discretionary and not compulsory. *Smith* v. *Massachusetts Mutual Life Ins. Co.*, 5 Cir., 167 F. 2d 990; *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620. The remedy by injunction is likewise discretionary. *Peay* v. *Cox*, 5 Cir., 190 F. 2d 123."

Appendix A

The district court withheld exercise of jurisdiction and retained the case to permit the exhaustion of state administrative and judicial remedies as might be available.

In every case in which the question was raised since the *Pullman* case in 1941, the United States Supreme Court has held that a district court should not pass on the merits of a controversy in a case such as the one before us until the highest court of the state has interpreted the state constitutional provision, statute, or regulation in question. *City of Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Spector Motor Service* v. *McLaughlin, Tax Commissioner*, 328 U. S. 101; *A. F. of L.* v. *Watson, supra; Shipman* v. *Dupre*, 339 U. S. 321; *Albertson* v. *Millard, supra; Government and Civic Employees Organizing Committee, CIO, et al.* v. *Windsor, et al., supra.*

In the instant case, there is no question that the Supreme Court of South Carolina is in a better position than the federal court to interpret the state statute. The fact that there might be delay, inconvenience and cost to the parties does not call for a different conclusion. We are here concerned with a much larger issue as to the appropriate relationship between state and federal authorities functioning as an harmonious whole.

It may be true that the statute in question is clear and unequivocal but this does not prevent us from exercising our discretion in requiring that it be submitted to the state court for interpretation. *Government and Civic Employees Organizing Committee, CIO, et al.* v. *Windsor, et al., supra.* It appears to us that the Michigan and Alabama Acts were clear and free from ambiguity. The Supreme Court, however, held that the district court should refrain from taking any action until the highest state court had passed upon the constitutionality of the Act. The state and federal courts of South Carolina have always worked in perfect harmony. To declare an act of the state legislature uncon-

stitutional should be left to the state court. This, of course, would not apply to statutes and constitutional provisions which have already been declared unconstitutional by the United States Supreme Court in the school segregation cases. We hold that the federal court should stay proceedings and permit the state court to pass upon the constitutionality of the Act in question. It is only by doing this that we avoid conflict between state and federal courts and preserve harmonious relationships which have heretofore existed between them.

The case should not be dismissed but should be retained and remain pending to permit the plaintiffs a reasonable time for the exhaustion of state administrative and judicial remedies as may be available; but thereafter such further proceedings, if any, will be had by this court as may then appear to be lawful and proper.

IT IS SO ORDERED.

A True Copy,

Attest,

ERNEST L. ALLEN
Clerk of U. S. District Court
East. Dist. So. Carolina

(Seal)

Appendix A

(Opinion of United States District Court, Eastern District of South Carolina, Charleston Division)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Civil Action No. 5792

OLA L. BRYAN, ESSIE M. DAVID, CHARLES E. DAVIS, ROSA D. DAVIS, VIVIAN V. FLOYD, BEE A. FOGAN, HATTIE M. FULTON, RUTHA M. INGRAM, MARY E. JACKSON, FRAZIER H. KEITT, LUTHER LUCAS, JAMES B. MAYS, LAURA PICKETT, HOWARD W. SHEPTON, BETTY SMITH, LEILA M. SUMMER and CLARENCE V. TOBIN,

Plaintiffs,

versus

M. G. AUSTIN, JR., as Superintendent of School District No. 7, of Orangeburg County, the State of South Carolina, and W. B. BOOKHART, HAROLD FELDER, T. T. McEACHERN, ELMO SHULER and ULMER WEEKS, as the Board of Trustees of School District No. 7, of Orangeburg County, the State of South Carolina,

Defendants.

On Application for Injunction.

(Argued October 22, 1956. Decided .)

Before:

PARKER, *Circuit Judge*, and TIMMERMAN and WILLIAMS, *District Judges*.

Appendix A

LINCOLN C. JENKINS, JR., THURGOOD MARSHALL and JACK GREENBERG, Attorneys for Plaintiffs;

A. J. HYDRICK, JR., MARSHALL WILLIAMS, ROBERT McC. FIGG, JR., P. H. McEACHIN, D. W. ROBINSON, T. C. CALLISON, Attorney General of South Carolina and DANIEL R. McLEOD and JAMES S. VERNER, Assistant Attorneys General of South Carolina, for Defendants.

TIMMERMAN, *District Judge*:

It is to be regretted that the members of this three-judge Court are not in agreement. In a general way, the order to be filed herein at the time that the separate opinions of the members of this Court are filed will correctly state the differences existing among the members of the Court. As will be seen by what shall follow, I am in disagreement with my colleagues on the main issues in this case.

This action was originally brought by eighteen negro plaintiffs, former school teachers, against the defendants, the Superintendent and Board of Trustees of School District No. 7, Orangeburg County, South Carolina, in which Elloree Training School is situate. As stated in plaintiffs' brief, the purpose of the action is to enjoin the defendants from "(1) refusing to continue plaintiffs' employment as school teachers *solely because of their membership in the National Association for the Advancement of Colored People;* (2) requiring plaintiffs to supply *information concerning their beliefs and associations* particularly with respect to membership in said association as a condition of continued employment; (3) refusing to continue plaintiffs' employment because they have refused to disclose whether or not they are members of said association." (Emphasis added.) Plaintiffs' case is based on the allegation that defendants acted in derogation of their rights

under an unconstitutional State statute; and, upon that allegation, a court of three judges was convened pursuant to 28 U. S. C. A., Sections 2281 and 2284. When the cause came on for hearing, the Court was informed that the plaintiff Carmichael had withdrawn from the case.

Plaintiffs allege that defendants deprived them of constitutional rights in the enforcement of the State statute. See Act No. 741, Acts and Joint Resolutions of the General Assembly of South Carolina, 1956. Plaintiffs claim that this statute is unconstitutional, in that defendants (a) required them to file written applications for employment, and (b) refused to re-employ them as school teachers when they failed to complete and file applications for employment on required forms. By their answer, defendants admit that plaintiffs were not re-employed because they failed to file completed application forms. They deny that plaintiffs had a legal right to be employed as teachers; that there was anything wrongful in their failure to re-employ plaintiffs; or that they in any way acted in the enforcement of the cited State Statute.

I agree that "[t]here is no dispute as to the facts." And such being the case, it is essential that *all* of the established and uncontradicted facts be considered, and that those "facts" which are the product of guess or surmise be eliminated.

Prior to the school year 1956-1957, all of the plaintiffs had been employed as school teachers in the Elloree Training School. They had no tenure. All teacher contracts were entered into between the teachers and the school officials for terms of nine or ten months (a single school year) terminating at the close of each term. The practice in the School District, one adopted many years prior to the enactment of the challenged State statute, was for applicants for employment or re-employment as teachers to submit written applications to the Superintendent of Schools in

the District. Prior to May, 1955, an application was not required to be in any prescribed form and was usually a letter addressed to the Superintendent. In May, 1955, however, defendants instituted the practice of providing applicants with printed forms for use in making applications. These forms contained a variety of questions to be answered by applicants pertaining to the applicant's personal as well as professional qualifications. For the school term 1955-1956, all applicants, including plaintiffs, completed such forms and submitted them to the Superintendent. From the applications submitted, defendants selected plaintiffs and others for employment for the school term 1955-1956. For the 1956-1957 school term defendants continued providing a form application for employment as teacher to any person requesting one. In essential detail the form used in 1956-1957 was identical with the form used in 1955-1956. Some of the plaintiffs submitted incomplete applications which the Superintendent returned to them for completion and filing. The plaintiffs never thereafter filed applications for employment, whether completed or not and, consequently, plaintiffs were not considered by the defendant-trustees as applicants. Some of the plaintiffs submitted so-called "resignations". Others were not heard from again. Thereafter, all teaching positions at the Elloree Training School for the current school term were filled from among other negroes who did apply for such employment. It is now proposed, as one may reasonably surmise from all that has been said, that plaintiffs wish the Court to turn the clock back to May, 1956, and enjoin the defendants from refusing to consider plaintiffs as applicants for teacher jobs.

As no plaintiff occupied the status of employee of the School District for the 1956-1957 school term, having entered into no contract for that term, the mentioned "resignations" were idle gestures. If they served any purpose

at all, it was to inform defendants that the so-called re signers were not seeking re-employment.

The evidence or, strictly speaking, the lack of it, leave in doubt which of the questions on the application forn plaintiffs were unwilling to answer. A form applicatio which defendants admit is genuine, is attached to the com plaint, but the applications submitted by plaintiffs an which were returned to them for completion were not o fered in evidence, although the plaintiffs presumably ha possession of them. The only testimony having any po sible bearing on the questions that plaintiffs were unwillin to answer was supplied by the plaintiff Davis, who, pr suming to speak for the others, stated that plaintiffs ob jected to answering all questions on the form other tha those asking for "professional information". Viewing th agreed form attached to the complaint in the light of th statement, it would appear that plaintiffs at least left th following questions unanswered:

> "Religious preference ..... Are you a mem ber? ..... If so, state church of which yo are a member ..... List any clubs, organiz tions, or fraternities to which you belong ..... Do you belong to the NAACP? ..... Does a member of your immediate family belong to th NAACP? ..... Do you support the NAAC in any way (money or attendance at meetings ..... Do you favor integration of races schools? ..... Are you satisfied with your wo and the schools as they are now maintaine Yes ..... No ..... If yes, comment Back. Do you feel that you would be happy in integrated school system, knowing that the paren and students do not favor this system? Yes ..... No ..... (Check one and give reason for yo answer) ..... Do you feel that an integrat

school system would better fit the colored race for their life's work? Yes ..... No ..... (check one and give reason for your answer) ..... Do you think that you are qualified to teach an integrated class in a satisfactory manner? Yes ..... No ..... (check one and give reason for your answer) ..... Do you feel that the parents of your school know that no public schools will be operated if they are integrated? Yes ..... No ..... Do you believe in the aims of the NAACP? ..... If you should join the NAACP while employed in this school, please notify the superintendent and the chairman of the board of trustees. Yes ..... No ..... Do you desire a position in the Elloree Training School for the 1956-1957 session?"

Plaintiffs contend that defendants' refusal to accept their incomplete applications for employment denied them rights, privileges, immunities, due process of law and the equal protection of the laws secured by the Fourteenth Amendment of the Constitution, and that the challenged statute, as to them, constitute a bill of attainder proscribed by Article I, Section 10, Clause 1 of the Constitution.

The record in this case does not bear out the assumption that defendants acted under the challenged statute. Hence the issue of the statute's constitutionality is not properly before the Court. Section 1 of the statute makes unlawful the *employment of a member of the National Association for the Advancement of Colored People* by a school district, and further provides that the prohibition against such employment shall continue so long as membership in such organization is maintained. There is an utter failure of evidence that plaintiffs were refused employment because of membership in any organization. Indeed, so far as the record discloses, only the plaintiff Ful-

ton is in fact a member of the NAACP, and she testified that she never told any of the defendants that she was a member; and there is no evidence that any of the defendants otherwise knew that she was a member. Hence, it is ridiculous to say that defendants were enforcing Section 1 of the statute in refusing to employ plaintiffs as teachers The best that can be said of this frivolous contention is that one might, if he was so disposed, surmise that defendants would have denied plaintiffs employment if the essential facts upon which to rest such action had existed elsewhere than in the imaginations of the plaintiffs.

Section 2 of the statute reads as follows:

> "Section 2. *The board of trustees* of any public school or State supported college *shall be authorized to demand of any* teacher or other employee of the school, who is suspected of being a member of the National Association for the Advancement of Colored People, that he submit to the board a written statement under oath setting forth whether or not he is a member of the National Association for the Advancement of Colored People, and the immediate employer of any employee of the State or of any county or municipality thereof is similarly authorized in the case any employee is suspected of being a member of the National Association for the Advancement of Colored People. Any person refusing to submit a statement as provided herein, *shall be summarily dismissed.*" (Emphasis added.)

It is apparent that section 2 applies only to *employees*, not to one who wants to be an employee, and the penalty authorized by the section is *dismissal*. The section, therefore, could have had no application to plaintiffs. No plaintiff was an "employee" of the Elloree Training School for the 1956-1957 school term with which we are here con-

cerned; and no plaintiff was "dismissed". They simply declined to become applicants for employment, and, in consequence of their failure to do so they were not employed. It is a distortion to classify plaintiffs as "employees". They were not employees at any time here relevant; and the *ipse dixit* of this Court cannot make them such. The practice of defendants in providing form applications for the use of those desiring employment as teachers for the 1956-1957 school term was nothing more than a continuation of the previous year's practice, which was not objected to by plaintiffs then. To say now that defendants adopted the application form as a means to the enforcement of the challenged statute would be to deal carelessly with the truth. It is an unchallenged fact that the adoption of the application form antedated the statute by ten months. Thus there is a total failure of evidence to support the jurisdiction of this Court.

Section 2281, Title 28 USCA, is as follows:

> "An interlocutory or permanent injunction restraining the *enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute* or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis added.)

As pointed out, plaintiffs were not in such a position that the defendants could have enforced the statute against them had they wanted to do so. The cited jurisdictional section does not give, nor was it intended to give, this

Court jurisdiction to pass upon the constitutionality of a State statute simply because some person here, or elsewhere, might be dissatisfied with its terms. Before a person can properly invoke the jurisdiction of a three-judge Court to hear an attack on the constitutionality of State statute, such person must not only allege, he must prove that the statute has been wrongfully enforced against him to his detriment, or that there is an impending threat to enforce it against him to his detriment. Otherwise, he has no right to vindicate and no interest to protect. Moreover, to claim the protection of a court of equity, a person must allege and prove that no legal remedy is available to him and that he will suffer irreparable injury if a court of equity does not grant relief.

As has been pointed out, on the authority of *Cohens* v. *Virginia*, 6 Wheaton 264, 404, "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." We are here concerned with the last of the two propositions; and I must decline to become a party to usurping power which this Court legally does not have. I also must refuse to classify the issues of the instant case as falling within the comprehension of the constitutional guarantees of the freedoms of speech and assembly, as claimed by plaintiffs. No plaintiff has testified in this case that the defendants have denied him or any of the others the right of free speech, or the right of free assembly; nor has any other witness done so. This Court, therefore, is without evidence of a denial of the rights of free speech and of free assembly; and clearly it has no right by tortuous deductions or unfounded assumptions to supply a seeming basis for such an issue.

The real issue in this case is whether or not public school authorities, acting on their own initiative, are constitutionally forbidden to inquire of applicants for teaching positions concernng their associations and beliefs.

Appendix A

This case in many respects is similar to *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 720, where one of the issues before the Court was stated as follows:

> "1. The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge."

Because of the admitted factual background of the instant case, there could not have arisen the issue of what the Court would do if defendants had in fact discharged plaintiffs because of membership in the NAACP. To the knowledge of defendants no plaintiff was a member and, therefore, no one of them could have been discharged for that reason.

The answer to the stated issue was given by the Court as follows:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid." 341 U. S. at 720.

This position was reaffirmed in *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485, 493, a case

even more closely in point than the *Garner* case. There the Court said:

> "We adhere to that case [*Garner* v. *Board of Public Works of Los Angeles, supra*]. A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

The *Garner* and *Adler* cases cannot be distinguished in principle from the instant case. Indeed, the present case is much stronger for the defendants than are the two cited cases, where *employees were dismissed* because of their failure to answer inquiries. Here, not only were plaintiffs not employed by defendants, they even refused to file applications for employment, because, as they say, it was none of the school trustees' business who their associates were; what their religious beliefs and affiliations were; to what organizations or societies they belonged; what their

views on integration were and how they thought it would affect negro children to be taught in an integrated school; what they thought of their own fitness to teach in an integrated school, etc. These and other considerations, which normal parents and competent school officials regard as of prime importance to school children, are taboo to plaintiffs. They and their abettors are now asking this Court to write that taboo into the federal Constitution. I know of no law that requires the defendants to select teachers with closed eyes and stuffed ears, ignorant of all but the most technical educational attainments of applicants. Hence I fail to see that plaintiffs have been deprived of any right, constitutional or other, by the defendants.

The inapplicability of the State statute makes it unnecessary to pass upon its constitutionality, but since that issue is discussed in another opinion, I deem it proper to state my views on it. I do not agree that the statute is unconstitutional. It is argued that the legislative findings of fact contained in the preamble of the challenged statute should be peremptorily dismissed as containing no specific finding that the purpose of the NAACP is "to overthrow the government by force and violence or to engage in any other form or criminal conduct." The plain meaning of that contention is that school trustees have no discretion in the selection of teachers except the discretion to refuse to select as teachers those who seek the overthrow of the government by force and violence, or who fall within the category of criminals.

Since one of the legislative findings is that "The National Association for the Advancement of Colored People has, through its program and leaders in the State of South Carolina, disturbed the peace and tranquility which has long existed between the white and negro races, and has threatened the progress and increased understanding between negroes and whites," what the plaintiffs' contention really means is, that a State has no legislative power to

preserve peace among its citizens or to promote, foster and protect the tranquility that has long existed between the White and Negro races within its borders; that the State's attempt to do any of these things is unconstitutional. In the light of the other legislative findings, it also means that a state cannot rule out of its schools teachers who would sow the seed of discord and unrest, which if unimpeded, would blossom into outright strife. It also means that a state cannot keep out of its schools teachers who falsely represent the existence of a disparity in educational advantages among the races that in fact does not exist, and who would subject school children to teachings that are untrue. It also means that a supposedly sovereign state cannot keep out of its schools teachers who would falsely represent conditions of economic and social strangulation to exist, which in fact do not exist. The concluding finding in the statute is that the NAACP " • • • is so insidious in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, that membership in such an organization is wholly incompatible with the peace, tranquility and progress that all citizens have a right to enjoy." This brings us face to face with matters of serious consequences. We must either conclude that the legislative findings uncontradicted by any evidence, are untrue, or that the considerations mentioned in the findings are of no legal concern to the people of a state affected thereby, and that any attempt by a state to protect school children from the evil consequences denounced by the statute would be unconstitutional. Such political philosophies presuppose that state governments are the enemies of its citizens. That, to say the least of it, is an un-American concept.

Plaintiffs have not undertaken to disprove the Legislative findings of fact contained in the challenged statute. Hence, I hold, on the authority of the below cited cases, that such findings of fact are conclusive. See: *Block* v.

Hirsh, 256 U. S. 135, 154, 155; *Radice* v. *New York*, 264 U. S. 292, 294-295; *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328; *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 195-196; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152; *Chesbro* v. *Los Angeles County Flood Control District*, 306 U. S. 459, 463; *Berman* v. *Parker*, 348 U. S. 26, 32.

Garner v. *Board of Public Works of Los Angeles*, 341 U. S. 716, cited herein on another point, supports the validity of the State statute. In it at pp. 720, 721, the Court said:

> "• • • We assume that under the Federal Constitution the Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. *Cf. Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 102-103 (1947), and a State is not without power to do as much."

In *Adler* v. *Board of Education of the City of New York, supra*, the Supreme Court upheld a New York statute and rules promulgated thereunder. The statute made persons associated with organizations found to be sub-

versive *prima facie* ineligible for employment in public schools. The statute made provisions for administrative and judicial review for persons adversely affected before any denial of employment or discharge became effective. The Court said, 342 U. S. at 491-492:

> "It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgement of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.
>
> "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn.* v. *Douds,* 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell,* 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because, first, of their advocacy of the overthrow of the government by force or violence, or secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose."

The State statute that is here assailed does not deprive anyone of the right to belong to the NAACP. It simply

prohibits the employment of persons as teachers only so long as they retain membership in the NAACP. Moreover, it operates only prospectively; it places no stigma on past membership in the NAACP. One who is a member may terminate his membership and become eligible for public employment. So also he may assemble with others of like mind and even condemn the statute, as plaintiffs are doing in this case. No penalty attaches to such action.

Wieman v. *Updegraff*, 344 U. S. 183, cited in a rival opinion, has no application to the present case. There, the Court struck down a State statute which barred from public employment persons who had ever belonged to an organization listed by the Attorney General of the United States as subversive. The rationale of that decision is thus stated by the Court, 344 U. S. 190:

> "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. 'They had joined, [but] did not know what it was, they were good, fine young men and women, loyal Americans, but they had been trapped into it—because one of the great weaknesses of all Americans, whether adult or youth, is to join something.' At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designed as such may have subsequently freed itself from the influences which originally led to its listing."

In the *Wieman* case, the statute was struck down *because it made past membership in an organization, irre-*

spective of circumstances then or late existing, a bar to public employment. In the case at bar, the challenged statute makes only existing and continued membership a bar. Yet, the statute has no applicability to this case since no action was or could have been taken under it by the defendants against the plaintiffs.

Nor can it be fairly said that *Slochower* v. *Board of Higher Education of New York City,* 350 U. S. 551, is applicable here. There, a professor employed at a publicly supported college was discharged because he invoked the Fifth Amendment against self-incrimination while testifying before a United States Senate investigating committee. The discharge was pursuant to a Charter provision of the City of New York. The provision was held unconstitutional after the Court concluded that the exercise of the privilege against self-incrimination was no indication of wrongdoing. Whether or not one agrees with the doctrine of the *Slochower* case, it has no applicability to the facts of this case.

The statute before us is based upon unchallenged findings of fact by the State Legislature that clearly have a rational basis. Indeed, if the statute has any bearing on constitutional liberties, it protects rather than limits them. The statute is designed to protect young minds from the poisonous effect of NAACP propaganda. It does not, as is surmised, *outlaw* membership in the NAACP. It doesn't even attempt to do so. It only prevents its members from carrying their programs into the classrooms of public schools, where it is deemed to be against the public interest to have them do so.

There is nothing in the Federal Constitution that denies a state the right to deal legislatively with its own local and domestic problems. The Tenth Amendment too often ignored in recent years, plainly and clearly declares that, "The powers not delegated to the United States by the

Constitution, nor prohibited by it to the states are reserved to the states respectively, or to the people." It is equally plain and clear that the power to dictate the terms upon which public schools may be operated by the states was not by the Constitution delegated to the United States or to its judges. It is also equally clear that there is nothing in the Constitution which denies to the states respectively the power to completely control their established public schools so long as equality of treatment is accorded to the races. And further, there is nothing in the Constitution which says that the equal treatment, required by the Constitution, is itself discrimination and is, therefor, unequal treatment.

It is agreed that no more important duty is imposed upon the courts than to protect the fundamental rights of all citizens against impairment by the exercise of usurped governmental power. Article VI of the Constitution provides that the Constitution (and this includes Article X thereof), and laws made pursuant thereto, shall be the supreme law of the land; and it binds every judge by oath or affirmation to support the Constitution in all its provisions even, as I apprehend, against other judges who would usurp the power to change the Constitution or to enact laws by edict to be by them enforced by the coercive misuse of the ancient writ of injunction.

While the purpose of this case, in a sense, is camouflaged, it is not too well hidden. It is to secure this Court's approval of the exercise of a veto power over state legislation dealing with purely local matters. If such is not the aim of this case, why should sixteen plaintiffs, professedly non-members of the NAACP, be lending their names for use in a court battle to install NAACP members of agents in the public schools of the State? The Bible has been ruled out of the public schools. *McCollum* v. *Board of Education*, 333 U. S. 203. The fight here is to rule NAACP's

theories of knowledge into them. If that is done, the government or its judges would thereby become invaders of the homes of citizens, superseding the authority and interest of parents in the rearing and training of their children. Knowing the inherent danger in such a vicious procedure, I unhesitatingly register my opposition to it; and may God protect the children of America if the courts will not and their parents cannot do so.

I conclude: (a) That the undisputed facts of this case, unattended by specious assumptions, clearly warrant the dismissal of the complaint and the entry of judgment for the defendants; (b) That the established facts of this case show that there exists no basis for the exercise of the jurisdiction of a three-judge district court and, for such reason, this Court should be dissolved and the case should be restored to the District Court's regular calendar; and (c) That, failing in agreement as to either (a) or (b) above stated, proceedings herein should be stayed pending state court construction of the challenged statute and determination as to its constitutionality.

A true copy. Attest

ERNEST L. ALLEN,
Clerk of U. S. District Court,
East. Dist. So. Carolina.

(Seal)

PARKER, Circuit Judge, Concurring in Part and Dissenting in Part:

I concur in so much of the decision of the Court as holds that the Court has jurisdiction of the cause and that same should not be dismissed. I dissent from that part of the decision which stays proceedings pending exhaustion of

state administrative and judicial remedies. I think that the Court should proceed to grant declaratory and injunctive relief to the plaintiffs in application of the principle stated by Chief Justice Marshall in Cohens v. Virginia, 6 Wheaton 264, 404 that "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given". One of the most important features of that ordered liberty which is guaranteed by our Constitution is that certain fundamental rights of the individual, including freedom of speech and freedom of assembly, shall not be denied or abridged by the exercise of governmental power, national or state. And no more important duty is imposed upon the courts of the United States than to protect those fundamental rights of the individual citizen against impairment by the exercise of governmental power.

I recognize, of course, that, in the application of the rule of comity, a federal court should stay action pending action by the courts of a state, where it is called upon to enjoin the enforcement of a state statute which has not been interpreted by the state courts, and where the statute is susceptible of an interpretation which would avoid constitutional invalidity. As the federal courts are bound by the interpretation placed by the highest court of a state upon a statute of that state, they should not enjoin the enforcement of a statute as violative of the Constitution in advance of such an interpretation, if it is reasonably possible for the statute to be given an interpretation which will render it constitutional. This is all that is held by the Supreme Court in such cases as *Shipman* v. *Du Pre*, 339 U. S. 321 and *A. F. of L.* v. *Watson*, 327 U. S. 582. 596, 598. The Supreme Court in *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 344, recognizes that proceedings should be stayed only where there is in-

volved "construction of a state statute so ill-defined that a federal court should hold the case pending a definitive construction of that statute in the state courts." In the case of *Toomer* v. *Witsell*, 334 U. S. 385, in which the District Court had upheld the constitutionality of a state statute, the Supreme Court reversed the decision without staying proceedings for action by the state courts. And in *Doud* v. *Hodge*, 350 U. S. 485, the Supreme Court reversed the dismissal of a case by a District Court where the dismissal was granted on the ground that a statute alleged to be unconstitutional had not been passed upon by the courts of the state. The rule as to stay of proceedings pending interpretation of a state statute by the courts of the state can have no application to a case, such as we have here, where the meaning of the statute is perfectly clear and where no interpretation which could possibly be placed upon it by the Supreme Court of the state could render it constitutional.

The statute, the constitutionality of which is here questioned, is as follows:

> "Section 1. Thirty days after the effective date of this act it shall be unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State, school district, county or any municipality thereof, and such prohibition against employment by the State, school district, county or any municipality thereof shall continue so long as membership in the National Association for the Advancement of Colored People is maintained.
>
> "Section 2. The board of trustees of any public school or State supported college shall be authorized to demand of any teacher or other employee of the school, who is suspected of being a member of

the National Association for the Advancement of Colored People, that he submit to the board a written statement under oath setting forth whether or not he is a member of the National Association for the Advancement of Colored People, and the immediate employer of any employee of the State or of any county or municipality thereof is similarly authorized in the case any employee is suspected of being a member of the National Association for the Advancement of Colored People. Any person refusing to submit a statement as provided herein, shall be summarily dismissed.

"Section 3. A person dismissed from, or declared ineligible for, employment under the provisions of this act, may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause before any circuit court of the State why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of dismissal or ineligibility based on the provisions of this act. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of an order of dismissal or declaration of ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or declaration of ineligibility.

"Section 4. Any person employing any individual contrary to the provisions of this act shall be subject to a fine of not exceeding one hundred dollars for each separate offense."

Appendix A

There is no finding in the preamble to the statute,* nor is there any contention, that it is the purpose of the National Association for the Advancement of Colored People to overthrow the government by force and violence or to engage in any other form of criminal conduct. The organization, as its name implies, is engaged in activities for advancing the interests of colored people; and this has in-

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* The preamble to the statute is as follows:

"Whereas, the National Association for the Advancement of Colored People has, through its program and leaders in the State of South Carolina, disturbed the peace and tranquility which has long existed between the White and Negro races, and has threatened the progress and increased understanding between Negroes and Whites; and

"Whereas, the National Association for the Advancement of Colored People has encouraged and agitated the members of the Negro race in the belief that their children were not receiving educational opportunities equal to those accorded white children, and has urged the members of the Negro race to exert every effort to break down all racial barriers existing between the two races in schools, public transportation facilities and society in general; and

"Whereas, the National Association for the Advancement of Colored People has made a strenuous effort to imbue the members of the Negro race with the belief that they are the subject of economic and social strangulation which will forever bar Negroes from improving their station in life and raising their standards of living to that enjoyed by the White race; and

"Whereas, the General Assembly believes that in view of the known teachings of the National Association for the Advancement of Colored People and the constant pressure exerted on its members contrary to the principles upon which the economic and social life of our State rests, and that the National Association for the Advancement of Colored People is so insidious in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, that membership in such an organization is wholly incompatible with the peace, tranquility and progress that all citizens have a right to enjoy. Now therefore, * * *."

volved its engaging in matters of public controversy such as the segregation cases, the results of which have been very unpopular in some sections. This, however, is no reason why it may be proscribed by law or its members denied the right of public employment. The right to join organizations which seek by lawful means to support and further what their members regard as in the public interest or in the interest of a particular part of the public, is protected by the constitutional guarantees of free speech and freedom of assembly; and such right is one of the bulwarks of liberty and of social progress. The fact that organizations may render themselves unpopular with the majority in a community is no reason why the majority may use its power to enact legislation denying to their members the fundamental rights of constitutional liberty. As was well said by Chief Justice Hughes in *De Jonge* v. *Oregon*, 299 U. S. 353, 364-365:

> "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. (Citing cases.) The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States* v. *Cruikshank*. 92 U. S. 542, 552, 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.' The First Amendment of the Federal Constitution expressly guarantees that right against abridgement by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil

and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. (Citing cases.)

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

See also *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Board of Education* v. *Barnette*, 319 U. S. 624, 641-642; *Thomas* v. *Collins*, 232 U. S. 516, 530-531.

In *Wieman* v. *Updegraff*, 344 U. S. 183, the Supreme Court held violative of the due process clause of the Fourteenth Amendment a state law requiring of state employees as a condition of employment an oath that they were not members of an organization listed by the Attorney General of the United States as subversive. The state supreme court had held that mere membership in such an organization was a disqualification, without knowledge of its criminal purposes. In holding the act violative of the

due process clause of the Fourteenth Amendment, the court said:

> "Under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and Garner, Adler and Gerende is decisive. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."

In that case the Supreme Court adverted to its statement in *United Public Workers* v. *Mitchell*, 330 U. S. 75, upholding the Hatch Act, that Congress could not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."

And in his concurring opinion Mr. Justice Frankfurter used the following language, which is peculiarly pertinent here, viz.:

> "The Constitution of the United States does not render the United States or the States impotent to guard their governments against destruction by enemies from within. It does not preclude measures of self-protection against anticipated overt acts of violence. Solid threats to our kind of government—manifestations of purposes that reject argument and the free ballot as the means for bringing about changes and promoting progress—may be met by preventive measures before such threats reach fruition. However, in considering the constitutionality

> of legislation like the statute before us it is necessary to keep steadfastly in mind what it is that is to be secured. Only thus will it be evident why the Court has found that the Oklahoma law violates those fundamental principles of liberty 'which lie at the base of all our civil and political institutions' and as such are imbedded in the due process of law which no State may offend."

In the very recent case of *Slochower* v. *Board of Higher Education*, 350 U. S. 551, the Supreme Court held squarely that public employment might not be denied on the ground that a person had exercised a right under the Constitution. In that case a professor in a publicly maintained college was discharged because he had invoked his right under the Fifth Amendment not to answer a question propounded in a Congressional inquiry. The Supreme Court followed its decision in the case of *Wieman* v. *Updegraff* and distinguished the cases of *Adler* v. *Board of Education*, 342 U. S. 485 and *Garner* v. *Los Angeles Board*, 341 U. S. 716, 720, upon which defendants rely. The court said:

> "The problem of balancing the State's interest in the loyalty of those in its service with the traditional safe-guards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. Adler v. Board of Education, 342 U. S. 485, upheld the New York Feinberg Law which authorized the public school authorities to dismiss employees who, after notice and hearing, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that

aim. Likewise Garner v. Los Angeles Board, 341 U. S. 716, 720, upheld the right of the city to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for the public service,' including their membership, past and present, in the Communist Party or the Communist Political Association. There it was held that the city had power to discharge employees who refused to file an affidavit disclosing such information to the school authorities.

"But in each of these cases it was emphasized that the State must conform to the requirements of due process. In Wieman v. Updegraff, 344 U. S. 183 we struck down a so-called 'loyalty oath' because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary. This case rests squarely on the proposition that 'constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.' 344 U. S., at 192."

The principle here involved is that the state may not deny a privilege because of exercise of constitutional rights. *Terral* v. *Burke Construction Co.*, 257 U. S. 529; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 594; *Alston* v. *School Board of City of Norfolk*, 4 Cir. 112 F. 2d 992, 997. The Court of Appeals of this Circuit, in the case last cited, quoting from the opinion in *Frost Trucking Co.* v. *Railroad Commission*, *supra*, said:

"Even in the granting of a privilege, the state 'may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a

condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.' "

The plaintiffs are in a position to raise the question of the constitutionality of the statute because one of them is a member of the Association and all have been denied employment because of their refusal to answer the questions as to membership in that organization. The school authorities may, of course, make inquiries of prospective teachers as to matters bearing upon their character and fitness to teach; but this is a very different thing from making inquiry as to membership in an organization which they have a right to join but membership in which, under state law, bars them of the right of employment. Just as they have a right not to be denied employment because of such membership, they have a right not to be denied employment for refusal to make oath with regard to the matter. What was required of them was not merely answers to questions but the filing of a sworn statement. This was requiring of them a "test oath" relating to membership as a condition of employment which was clearly an invasion of their constitutional rights as held in *Wieman* v. *Updegraff, supra.*

It is argued that plaintiffs are no longer employed by defendants and that they have no applications for positions pending which could be adversely affected by the statute. This is to take too narrow a view of the rights of plaintiffs, who are public school teachers by profession whose rights are invaded by the statute and the inquiries to which they have been subjected thereunder. They are seeking here a declaration as to their rights in a suit instituted against representatives of the state charged with the enforcement of the statute in the locality in which they reside, in which the provisions of the statute have been enforced against them, in which they desire to teach and in which they would naturally seek employment as teachers in the future.

Appendix A

In the case of *Alston* v. *School Board of Norfolk, supra,* 4 Cir. 112 F. 2d 992, the Court of Appeals of the Fourth Circuit had before it a case in which injunction was sought against fixing the salaries of Negro teachers at a lower rate than that of white teachers. It was argued that plaintiffs had no right to maintain the suit because employment was optional with the school board and they had entered into contracts for the current year at the rate fixed by the discriminatory practice. The court rejected this contention in language which is appropriate here, saying:

> "We come, then, to the second question, i.e., do plaintiffs as Negro teachers holding certificates qualifying them to teach in the public schools of Norfolk have rights which are infringed by the discrimination of which they complain? The answer to this must be in the affirmative. As teachers holding certificates from the state, plaintiffs have acquired a professional status. It is true that they are not entitled by reason of that fact alone to contracts to teach in the public schools of the state; for whether any particular one of them shall be employed to teach is a matter resting in the sound discretion of the school authorities; but they are entitled to have the compensation for positions for which they may apply, and which will unquestionably be awarded to some of them, fixed without unconstitutional discrimination on account of race. As pointed out by Judge Chesnut, in Mills v. Lowndes, supra, they are qualified school teachers and have the civil right, as such, to pursue their profession without being subjected to discriminatory legislation on account of race or color. It is no answer to this to say that the hiring of any teacher is a matter resting in the discretion of the school authorities. Plaintiffs, as teachers qualified and subject to employment by the state, are

entitled to apply for the positions and to have the discretion of the authorities exercised lawfully and without unconstitutional discrimination as to the rate of pay to be awarded them, if their applications are accepted.

"Nor do we think that the fact that plaintiffs have entered into contracts with the school board for the current year at the rate fixed by the discriminatory practice precludes them from asking relief. What the effect of such contracts may be on right to compensation for the current year, we need not decide, since plaintiffs are not insisting upon additional compensation for the current year and their prayer for relief asks a broad declaration of rights and injunctive relief for the future. As qualified teachers holding certificates, they have rights as above indicated which are not confined to the contract for the current year, i.e., the right to apply for positions in the future and to have the Board award the positions without unconstitutional discrimination as to the rate of pay."

It is argued also that plaintiffs are not entitled to invoke the process of this court because they have not exhausted administrative remedies and that at all events they should proceed in the state courts as the legislation in question has not been before that court for interpretation. As to the latter contention, it is perfectly clear, as heretofore pointed out, that there is no ambiguity in the statute and that no interpretation which could be placed upon it by the Supreme Court of the state would render it constitutional and that consequently there is no reason to stay proceedings in the federal court while the state courts are giving it consideration. Likewise, as to exhaustion of administrative remedies, there is no reason to stay proceedings in the federal court for exhaustion of remedies under the statute, when no remedy could possibly cure the basic

efect of unconstitutionality. Furthermore, the remedy pro-ided by the statute is not administrative but judicial; and t is well settled that judicial remedies in state courts need ot be exhausted before resorting to a federal court. *Lane . Wilson*, 307 U. S. 268; *Carson* v. *Warlick*, 4 Cir. — F. d —. The contention that there is an adequate remedy t law is manifestly without merit since plaintiffs obvi-usly cannot recover damages for breach of a contract that as not been made and any recovery of damages under the ivil right statute would be speculative and problematical. Only by declaratory and injunctive relief can they obtain ny adequate protection of their rights which have been nvaded by the statute and the action taken thereunder.

As to the relief which the Court should grant, plaintiffs re not asking an award of damages and any question with egard thereto is not before us. The action is not one in vhich the court could direct that the plaintiffs be restored o the positions formerly held by them in view of the fact hat their term of employment ended with the school year n June 1956 and they did not seek reemployment for the uceeding year. The court can and should, however, pro-ect the rights of plaintiffs for the future by declaring he statute unconstitutional and enjoining the defendants rom enforcing it against plaintiffs either by denying them mployment because of membership in the National Asso-iation for the Advancement of Colored People or requir-ng them as a condition of employment to make affidavit or answer questions with regard to such membership. In ny opinion, decree to that effect should be entered without waiting action in the state courts. as the statute is un-mbiguous and clearly unconstitutional.

A True Copy, Attest,

ERNEST L. ALLEN,
Clerk of U. S. District Court,
East. District of South Carolina.
(Seal)

Appendix A

(Order)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 5792

OLA L. BRYAN, ESSIE M. DAVID, CHARLES E. DAVIS, ROSA D. DAVIS, VIVIAN V. FLOYD, BEE A. FOGAN, HATTIE M. FULTON, RUTHA M. INGRAM, MARY E. JACKSON, FRAZIER H. KEITT, LUTHER LUCAS, JAMES B. MAYS, LAURA PICKETT, HOWARD W. SHEPTON, BETTY SMITH, LEILA M. SUMMER and CLARENCE V. TOBIN,

Plaintiffs,

versus

M. G. AUSTIN, JR., as Superintendent of School District No. 7, of Orangeburg County, the State of South Carolina, and W. B. BOOKHART, HAROLD FELDER, T. T. McEACHERN, ELMO SHULER and ULMER WEEKS, as the Board of Trustees of School District No. 7, of Orangeburg County, the State of South Carolina,

Defendants.

This cause coming on to be heard by the undersigned, constituting a special District Court of three judges convened in accordance with the statute; and being heard upon the pleadings, testimony and briefs and arguments of counsel:

Judge Williams being of opinion that the court has jurisdiction of the cause but that proceedings therein should be stayed for reasons set forth in his opinion filed herewith; and Judge Parker concurring in the opinion that the

court has jurisdiction of the cause and should proceed to grant relief as set forth in his opinion filed herewith; and Judge Timmerman being of opinion that the case should be dismissed for lack of jurisdiction and for lack of merit, but that, if not dismissed, proceedings therein should be stayed, as set forth in his opinion filed herewith; so that it is the opinion of a majority of the court that the court has jurisdiction of the cause and also the opinion of a majority of the court that, if there is jurisdiction, the proceedings should be stayed.

Now, therefore, it is ordered that the case be retained and remain pending upon the docket but that proceedings therein be stayed to permit the plaintiffs a reasonable time for the exhaustion of state administrative and judicial remedies, after which such further proceedings, if any, will be had by this court as may then appear proper in the premises.

This the 22nd day of January 1957.

/s/ JOHN J. PARKER,
Chief Judge, Fourth Circuit,

/s/ GEORGE BELL TIMMERMAN,
U. S. District Judge, Eastern and Western Districts of South Carolina.

/s/ ASHTON H. WILLIAMS,
U. S. District Judge, Eastern District of South Carolina.

A True Copy, Attest,

ERNEST L. ALLEN,
Clerk of U. S. District Court,
East. Dist. So. Carolina.
(Seal)

Appendix B

(Statutes)

ACT No. 741 OF THE GENERAL AND PERMANENT LAWS OF SOUTH CAROLINA, 1956, ENACTED MARCH 17, 1956

An Act To Make Unlawful The Employment By The State, School District Or Any County Or Municipality Thereof Of Any Member Of The National Association For The Advancement Of Colored People, And To Provide Penalties For Violations.

Whereas, the National Association for the Advancement of Colored People has, through its program and leaders in the State of South Carolina, disturbed the peace and tranquility which has long existed between the White and Negro races, and has threatened the progress and increased understanding between Negroes and Whites; and

Whereas, the National Association for the Advancement of Colored People has encouraged and agitated the members of the Negro race in the belief that their children were not receiving educational opportunities equal to those accorded white children, and has urged the members of the Negro race to exert every effort to break down all racial barriers existing between the two races in schools, public transportation facilities and society in general; and

Whereas, the National Association for the Advancement of Colored People has made a strenuous effort to imbue the members of the Negro race with the belief that they are the subject of economic and social strangulation which will forever bar Negroes from improving their station in life and raising their standard of living to that enjoyed by the White race; and

Whereas, the General Assembly believes that in view of the known teachings of the National Association for the Advancement of Colored People and the constant pressure

exerted on its members contrary to the principles upon which the economic and social life of our State rests, and that the National Association for the Advancement of Colored People is so insidious in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, that membership in such an organization is wholly incompatible with the peace, tranquility and progress that all citizens have a right to enjoy. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

No NAACP member to be employed by State:

SECTION 1.

Thirty days after the effective date of this act it shall be unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State, school district, county or any municipality thereof, and such prohibition against employment by the State, school district, county or any municipality thereof shall continue so long as membership in the National Association for the Advancement of Colored People is maintained.

Written oaths may be required regarding NAACP status:

SECTION 2.

The board of trustees of any public school or State supported college shall be authorized to demand of any teacher or other employee of the school, who is suspected of being a member of the National Association for the Advancement of Colored People, that he submit to the board a written statement under oath setting forth whether or not he is a member of the National Association for the Advancement of Colored People, and the immediate employer of

any employee of the State or of any county or municipality thereof is similarly authorized in the case any employee is suspected of being a member of the National Association for the Advancement of Colored People. Any person refusing to submit a statement as provided herein, shall be summarily dismissed.

Appeals from dismissals:

SECTION 3.

A person dismissed from, or declared ineligible for, employment under the provisions of this act, may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause before any circuit court of the State why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of dismissal or ineligibility based on the provisions of this act. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of an order of dismissal or declaration of ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or declaration of ineligibility.

Penalties:

SECTION 4.

Any person employing any individual contrary to the provisions of this act shall be subject to a fine of not exceeding one hundred dollars for each separate offense.

Repeal:

SECTION 5.

All acts or parts of acts inconsistent herewith are hereby repealed.

Appendix B

Time effective:

SECTION 6.

This act shall take effect upon its approval by the Governor.

Approved the 17th day of March, 1956.

"Section 21-103 (1). Subject to the provisions of Section 21-230, as amended, any parent or person standing *in loco parentis* to any child of school age, the representatives of any school or any person aggrieved by any decision of the Board of Trustees of any school district in any matter of local controversy in reference to the construction or administration of the school laws or the placement of any pupil in any school within the district, shall have the right to appeal the matter in controversy to the County Board of Education by serving a written petition upon the Chairman of the Board of Trustees, the Chairman of the County Board of Education and upon the adverse party within ten (10) days from the date upon which a copy of the order or directive of the Board of Trustees was delivered to him by mail or otherwise. The petition shall be verified and shall include a statement of the facts and issues involved in the matter in controversy. The parties shall be entitled to a prompt and fair hearing by the board which shall try the matter *de novo* and in accordance with its rules and regulations. Where individual children of school age are involved in the matter of controversy, the case of each child shall be heard and disposed of separately.

"Section 21-103 (2). After the parties have been heard, the County Board of Education shall issue a written order disposing of the matter in controversy, a copy of which shall be mailed to each of the parties at interest and any party aggrieved thereby shall have the right to appeal to the Court of Common Pleas of the County by serving a written verified petition upon the Chairman of the County Board of Education and upon the adverse party within

ten (10) days from the date upon which copy of the order of the County Board of Education was mailed to the petitioner. The parties so served shall have twenty (20) days from the date of service, exclusive of the date of service, within which to make return to the petition or to otherwise plead, and the matter in controversy shall be tried by the circuit judge, *de novo*, with or without reference to a master or special referee; provided, that the County Board of Education shall certify to the court the record of the proceedings upon which its order was based, and the record so certified shall be admitted as evidence and considered by the court, along with such additional evidence as the parties may desire to present. The courts shall consider and dispose of the cause as other equity cases are tried and disposed of, and all parties at interest shall have such rights and remedies, including the right of appeal, as are now provided by law in such cases.

"Section 21-103 (3). In counties where the functions of the Board of Trustees and those of the County Board of Education have been combined, the appeal provided in Section 21-103 (1) shall lie to the County Board of Education from its original action disposing of the matter in controversy before hearing.

"Section 21-103 (4). At any hearing provided for in Section 21-103 (1), the parties may appear in person or through an attorney licensed to practice in South Carolina and may submit such testimony, under oath, or other evidence as may be pertinent to the matter in controversy.

"Section 21-103 (5). The County Board of Education may designate one of its members to conduct any hearing provided for in Section 21-103 (1) and report the matter to the board for determination.

"Section 21-103 (6). Until the matter in controversy has been finally disposed of, no appeal shall act as a *supersedeas* or suspension of the order of the board having original jurisdiction of the cause."

Appendix C

(Teacher Application)

Name .....
Home Address .....
Date of Birth..... Age..... Race..... Sex.....
Marital Status..... No. of Children..... Living with Husband or Wife?.....

CERTIFICATE INFORMATION

Group..... Class..... Grade..... Date of Expiration.....
Years experience prior to July 1, 1955..... Years in present position.....
Subjects or fields in which certified to teach .....
.....
High school attended .....
List colleges attended .....
Summer schools attended (last five years) .....
Extension courses (last five years) .....
Giving dates and degrees .....
Religious preference..... Are you a member?.....
If so, state church of which you are a member .....
List any clubs, organizations, or fraternities to which you belong .....
Do you belong to the NAACP?..... Does any member of your immediate family belong to the NAACP?.....
Do you support the NAACP in any way (money or attendance at meetings)? .....
Do you favor integration of races in schools?.....
Are you satisfied with your work and the schools as they are now maintained? Yes..... No..... If yes, comment on back.

Appendix C

Do you feel that you would be happy in an integrated school system, knowing that the parents and students do not favor this system? Yes..... No..... (Check one and give reason for your answer) .....
.....

Do you feel that an integrated school system would better fit the colored race for their life's work? Yes..... No..... (check one and give reason for your answer)
.....

Do you think that you are qualified to teach an integrated class in a satisfactory manner? Yes..... No..... (check one and give reason for your answer) .....
.....

Do you feel that the parents of your school know that no public schools will be operated if they are integrated? Yes..... No.....

Do you believe in the aims of the NAACP? .....

If you should join the NAACP while employed in this school, please notify the superintendent and chairman of the board of trustees. Yes..... No.....

Do you desire a position in the Elloree Training School for the 1956-1957 session? .....

THE STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG.

Personally comes before me the undersigned, who on oath says that the above statements are true.

Sworn to before me this ..... day of ....., 1956.

..... Signed.....
Notary Public of South Carolina

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1966

No. 881

OLA L. BETAN, et al., APPELLANTS,

vs.

W. G. AUSTIN, JR., et al., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

STATEMENT IN OPPOSITION TO JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM

A. J. Bollinger, Jr.
Marshall Williams
Orangeburg, S. C.

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Charleston, S. C.

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Florence, S. C.

David W. Robinson
1323 Washington Street
Columbia, S. C.

Attorneys for the Appellees

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1956

No. 931

OLA L. BRYAN, *et. al.*, APPELLANTS,

vs.

M. G. AUSTIN, JR., *et al.*, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

STATEMENT IN OPPOSITION TO JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM

OPINIONS BELOW

The opinions below are incorporated in the Appellants' Appendix pp 1a-41a. The Order of the Court is shown in the Appendix pp 42a-43a. These opinions are reported as *Bryan v. Austin*, 148 F. Supp. 563.

STATUTES INVOLVED

The statutes at issue are:

(1) Act No. 741 of the South Carilina General Assembly, 1956, shown in the Appellants' Appendix pp 44a-47a;

(2) Section 21-103 of the South Carolina Code of 1952, Appellants' Appendix 47a-48a.

(3) Act No. 324 of the South Carolina General Assembly, 1957, repealing Act No. 741 of 1956, Appellees' Appendix p. 51.

STATEMENT OF THE CASE

In its 1956 Session, the General Assembly of the State of South Carolina enacted Act No. 741 of that Session, which became effective on March 17, 1956, whereunder it was made unlawful, thirty days after the effective date of the Act, for any school district of the State to employ any member of the National Association for the Advancement of Colored People, such prohibition continuing so long as such membership was maintained. The Trustees of any school were authorized by the Act to require any teacher or other employee suspected of such membership to submit a written statement under oath in reference thereto. (Appellants' Jurisdictional Statement, Appendix B, page 44a).

In May, 1956, the appellee Austin, as Superintendent of School District No. 7 of Orangeburg County, South Carolina, handed or sent to each white and Negro teacher in the school district the employment application blank attached to the complaint (Appellants' Jurisdictional Statement, Appendix C, page 49a), which included the question "Do you belong to the NAACP?". This application blank had been approved by the other appellees as the members of the Board of Trustees of the school district.

The appellants were Negro teachers, who had been employed in the school district for varying periods of time. They had signed and filed a substantially similar application blank in 1955, which was not under oath. One of the appellants, Hattie Fulton, was in May 1956 a member of the National Association for the Advancement of Colored People, a fact which was not known to the appellant Charles E. Davis, the principal of the school in which they taught, nor to the appellees.

When each of the appellants refused to sign the application for employment for the 1956-57 school year, the appellee Austin asked them to sign a form of resignation effective at the end of their current employment period (May 31, 1956 or June 30, 1956), so that the Board of Trustees would

know definitely the position of each. There was no threat or coercion. Some, including the appellant Hattie Fulton, executed the resignation. Those signing the resignation understood that its effect was to remove them from consideration for employment for the 1956-1957 school year.

No appellant having filed an application for employment, none was considered in filling the teaching positions in the school district for the school year 1956-57, which began on September 4, 1956. Each was so notified on May 15, 1956. No appellant then or thereafter asked for reconsideration of such action, or filed any application for employment, or appealed to the Board of Trustees or to the County Board of Education or to the State Court.

There is neither allegation nor evidence that any of the appellants had any contractual right extending beyond June 30, 1956. There is no teacher tenure under the school laws of South Carolina, and none is asserted by the appellants.

This action was commenced on September 10, 1956. The appellants prayed that the District Court enter preliminary and final injunctions restraining the appellees from enforcing Act No. 741 of the Acts of 1956, and that it adjudge, declare and decree the rights and legal relationships of the parties.

The District Court, after taking the testimony, ordered that the case be retained and remain pending on the docket but that proceedings therein be stayed to permit the appellants a reasonable time for the exhaustion of state administrative and judicial remedies, after which such further proceedings, if any, will be had by the District Court as may then appear proper in the premises. *Bryan, et al., v. Austin, et. al.*, 148 F. Supp. 563.

At its 1957 Session, the General Assembly of the State of South Carolina enacted a statute repealing Act No. 741 of 1956. It became effective on April 24, 1957. (App. 51.)

The question presented on this appeal is whether the District Court correctly denied injunctive relief restraining the enforcement of Act No. 741 of the Acts of 1956, relegating the appellants to administrative remedies and to State courts. (Appellants' Jurisdictional Statement, page 3.)

MOTIONS TO DISMISS OR AFFIRM

I. The appellees M. G. Austin, Jr., et al., move this Honorable Court to dismiss the appeal herein, upon the ground that there is no actual controversy involving real and substantial rights between the parties, and no subject matter upon which the judgment of the Court can operate, in that (a) Act No. 741 of the Acts of the General Assembly of the State of South Carolina, 1956, to restrain the enforcement of which this action was instituted, was repealed, effective April 24, 1957, and is no longer the law of South Carolina, and (b) no issue justiciable in the present action was or is presented by the pleadings and evidence, the appellants having no tenure under the South Carolina school laws and no contractual relationship with the school district at the time of the commencement of this action, and there being neither allegation nor proof that there are, or were at the commencement of this action, any teaching positions unfilled in School District No. 7 of Orangeburg, South Carolina.

II. The appellees M. G. Austin, Jr., et al., also move this Honorable Court to dismiss the appeal herein, or in the alternative to affirm the order appealed from, upon the ground that there is lack of substance in the question sought to be presented to this Court in the appeal, in that the order appealed from was within the discretion of the District Court, and it does not appear that such discretion was erroneously exercised under the circumstances appearing in the record.

ARGUMENT

I (a)

The Cause is Moot Because of the Repeal of Act No. 741.

It is respectfully submitted that, Act No. 741 of the Acts of 1956 having been repealed effective April 24, 1957, the question whether a preliminary injunction should have been issued by the District Court is now moot, that there is now no actual controversy and no subject matter upon which the judgment of the Court can operate, and that under settled principles the appeal should be dismissed.

Mills v. Green, 159 U. S. 651;
New Orleans Flour Inspectors v. Glover, 160 U. S. 170;
Dinsmore v. Southern Express Co., 183 U. S. 115, 120;
Metzger Motor Car Co. v. Parrott, 233 U. S. 36;
Berry v. Davis, 242 U. S. 468;
United States v. Alaska S. S. Co., 253 U. S. 113;
Dorchy v. Kansas, 264 U. S. 286, 289;
National Milk Producers v. City & County of San Francisco, 317 U. S. 423.

In *Mills v. Green*, 159 U. S. 651, 653, the Court held:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

And further, at page 657:

> "The lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the constitution and public laws of each State of the Union."

In *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, it was held:

> "The decree below enjoined appellants from enforcing against appellees Act No. 71 of the extra session of the general assembly of Louisiana of 1807, (Session Laws La. Ex. Sess. 1870, 156). This act was repealed June 28, 1892, (No. 23 of 1892, Acts La. 1892, 34), and the appeal is dismissed on the authority of *Mills v. Green*, 159 U. S. 651."

Any suggestion that may be made that this Court should retain the cause and consider the validity and effect of the 1957 repealing act, in lieu of the repealed 1956 act, is answered by the holding of the Court in *United States v. Alaska S. S. Co.*, 253 U. S. 113. In that case, the District Court of three judges had held that the Interstate Commerce Commission had no authority to prescribe the terms of carriers' bills of lading, and an injunction *pendente lite* against the Commission was granted. Pending the appeal, the Transportation Act of 1920 was passed by Congress. This Court held:

"The Transportation Act of 1920, passed pending this appeal, makes it evident (and it is in fact conceded in the brief filed by appellants) that changes will be required in both forms of bills of lading in order that they may conform to the requirements of the statute. We need not now discuss the details of these changes. It is sufficient to say that the act requires them as to both classes of bills. We are of opinion that the necessary effect of the enactment of this statute is to make the cause a moot one. In the appellants' brief it is insisted that the power of the Commission to prescribe bills of lading is still existent, and has not been modified by the provisions of the new law. But that is only one of the questions in the case. It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it . . .'

"In the present case what we have said makes it apparent that the complainants do not now need an injunction to prevent the Commission from putting in force bills of lading in

the form prescribed. The subsequent legislation necessitates the adoption of different forms of bills in the event that the power of the Commission be sustained. This legislation, having that effect, renders the case moot. *Berry v. Davis*, 242 U.S. 468."

Moreover, the 1957 Act applies to memberships in all associations, and does not prohibit employment on account of any such membership. Its validity and effect may properly be considered only upon its actual application to his detriment to some party complaining thereabout.

I (b)

No Justiciable Controversy Was Presented.

It is respectfully submitted that no issue justiciable in the present action was or is presented by the pleadings and evidence, since the appellants had no tenure under the South Carolina school laws and no contractual relationship with the school district at the time of the commencement of this action, and there was neither allegation nor proof that there are, or at the time of the commencement of this action were, any teaching positions unfilled in the school district. No damages were sought by the appellants in this action, and there were in existence no positions as to the filling of which the Court could by its judgment require the appellants to be considered by the appellees.

It is also submitted that there is no evidence that any appellant was aggrieved by the provisions of Act No. 741. Section 1 of the Act prohibits the employment of a member of the NAACP by the School District but only one of the appellants was, on May 15, 1956, a member of the NAACP and no Appellee knew that she was a member. The Appellants were not considered for employment because none filed an application for employment and most signed a resignation, the effect of which was to withdraw his or her name from consideration. Section 2 of the Act requiring the discharge of a School District employee who refuses to answer whether he or she is a member of NAACP is not applicable since no Appellant was discharged. App. 45a.

The requirements of case or controversy are no less strict under the Declaratory Judgments Act than in case of other

suits, *Altvater v. Freeman*, 319 U.S. 359, 363, and a controversy must be a real and substantial admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, and must be one that is appropriate for judicial determination, as distinguished from one that is academic or moot, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 241. *Cf. United Public Workers v. Mitchell*, 330 U.S. 75, 89, 90, 91.

In *Coffman v. Breeze Corporations*, 323 U.S. 316, 323, 324, the Court held:

"Appellant thus fails to assert any right of recovery at law in the present suit or to show that its remedy available at law is so inadequate as to entitle it to ask an equitable remedy.***

"So far as the present suit seeks a declaratory judgment or an injunction restraining payment of the royalties into the Treasury, it raises no justiciable issue. Appellant asserts in the present suit no right to recover the royalties. It asks only a determination that the Royalties Adjustment Act is unconstitutional and, if so found, that compliance with the Act be enjoined, an issue which appellee by its answer declines to contest. If contested the validity of the Act would be an issue which, so far as it could ever become material, would properly arise only in a suit to recover the royalties, where it could be appropriately decided.

"In the circumstances disclosed by the record and for purposes of the present suit, the constitutionality of the Act is without legal significance and can involve no justiciable question unless and until appellant seeks recovery of the royalties, and then only if appellee relies on the Act as a defense. The prayer of the bill of complaint that the Act be declared unconstitutional is thus but a request for an advisory opinion as to the validity of a defense to a suit for recovery of the royalties. * * * The bill of complaint thus fails to disclose any ground for the determination of any question of law or fact which could be the basis of a judgment adjudicating the rights of the parties."

The appellants in the instant case have not alleged or proved a case in which the Court can grant relief, since there

are no positions unfilled in the school district's schools, and hence none in the filling of which the Court can by its judgment order that the appellants be considered. "The thing sought to be prohibited has been done, and cannot be undone by any order of court." *Jones v. Montague,* 194 U.S. 147, 153. Their remedy is by an action for the recovery of the damages which they may allege and prove that they sustained by reason of alleged illegal acts of the appellees, and the constitutionality of the legislative act complained of will be an issue to be considered by the Court if it is relied on by the appellees as a defense. To grant a declaratory judgment in the instant case as to the validity of the act would be to determine the validity of a defense based thereon in another action before it has been instituted. The situation here is similar in substance to that considered in *Coffman v. Breeze Corporations, supra,* and it is respectfully submitted that the instant case comes within the principle which governed the decision there.

The appellants in the District Court relied upon *Alston v. School Board of City of Norfolk,* 4 Cir., 112 F. 2d 992, 130 A.L.R. 1506, *certiorari denied,* 311 U.S. 693, but that case the situation was not like that existing on the day the instant action was commenced in September, 1956, by which time all the teaching positions in the school district had been filled. The situation in the *Alston* case was like that existing in May, 1956, when the employment of the appellants was under consideration, or later up to the time when the teaching positions were all filled.

II.

There Was No Abuse of Discretion in Denying an Interlocutory Injunction

It is respectfully submitted that the appeal herein should be dismissed, or in the alternative that the order appealed from should be affirmed, upon the ground that there is lack of substance in the question sought to be presented to this Court, in that it does not appear that the District Court erroneously exercised its discretion in staying proceedings in the action under the circumstances appearing in the record.

Since the District Court has rendered no final judgment we do not discuss the merits of this case. (App. 42a). The appeal here is from the failure of that Court to grant an interlocutory injunction. Usually a temporary or interlocutory injunction is granted only when the Court concludes that the *status quo* should be maintained until a judgment on the merits. The issuance of such an injunction is discretionary and will not be issued unless irreparable injury may otherwise result. *Yakus v. U. S.*, 321 U.S. 414, 440; *Rice v. Lathrop*, 278 U.S. 509, 514.

Here there is no *status quo* to maintain. Either on May 31, 1956 or on June 30, 1956 the employment contracts of the Appellants expired. On or about May 15, 1956 all of the Appellants were notified and understood that they would not be considered for employment for the school term beginning September 4, 1956. In fact, most of them signed resignations which they understood operated as withdrawals of their names from employment consideration.

No Appellant asked the Trustees or the County Board of Education to review the decision that they not be employed though such a remedy was available (App. 47a). No Appellant took advantage of his right of review in the South Carolina Courts (App. 46a). As teachers, each knew that the Trustees would have to fill the teaching positions at some time between May 15th and September 4th when school opened. Yet they waited until September 10th to institute this suit.

Under these circumstances there was no abuse of discretion in refusing a temporary injunction.

CONCLUSION

For the reasons herein assigned it is urged that the Appeal be dismissed or in the alternative the judgment below be affirmed.

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May 1957.

APPELLEES' APPENDIX

(R324, H1462)

An Act To Authorize State, County, And Municipal Officers, Departments, Boards And Commissions, And All School Districts, To Require Written Applications For Employment And To Prescribe The Form Thereof, And To Repeal Act No. 741 Of The Acts Of 1956.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. State, county, and municipal officers, departments, boards and commissions, and all school districts in this State, shall require applications in writing for employment by them, upon such application forms as they may severally prescribe, which shall include information as to active or honorary membership in or affiliation with all membership associations and organizations.

SECTION 2. The provisions of this act shall not apply to any office or position which by law is filled by the vote of the qualified electors in any general or special election.

SECTION 3. Act No. 741 of the Acts and Joint Resolutions of the General Assembly of the State of South Carolina in the Regular 1956 Session, and also all other acts or parts of acts inconsistent with the provisions of this act are repealed.

SECTION 4. This act shall take effect upon approval by the Governor.

In the Senate House the 23rd day of April
In the Year of Our Lord One Thousand Nine Hundred and Fifty-seven.

ERNEST F. HOLLINGS,
President of the Senate.
SOLOMON BLATT,
Speaker of the House of Representatives.

Approved the 24th day of April, 1957.

GEORGE BELL TIMMERMAN, JR.,
Governor.

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FILED
MAY 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 931

OLA L. BRYAN, *et al.*,

Appellants,

against

M. G. AUSTIN, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

The Cause Is Not Moot.

Appellants' Jurisdictional Statement was filed April 22. On April 23, Act No. 741, whose constitutionality is one of the issues in this case, was repealed by the South Carolina Legislature. On April 24th, Governor Timmerman signed the repealer. Appellees now contend that this move made by one of their number (the State has appeared herein by its Attorney General) moots the case.

But this tactic does not convert the case into one in which this Court "cannot affect the rights of the litigants in the case before it," *St. Pierre* v. *United States*, 319 U. S. 41, 42, nor does the repeal of Act. No. 741 create a circumstance in which "[a]ll possibility or threat of the [prior

situation] has disappeared now," *Berry* v. *Davis*, 242 U. S. 468, 470. The threat is the same: Appellees' answer asserts and the record otherwise demonstrates (R. 64-68; Motion to Dismiss or Affirm p. 2) that prior to Act No. 741's adoption, as a prerequisite to employment, they required reply to questions concerning NAACP membership and the applicants' views concerning desegregation;[1] appellees' answer also states that following the statute's enactment they would have conditioned employment on reply to such questions even had there not been a statute:

> "13. That the inquiries contained in the employment application tendered to all of the teachers in Orangeburg School District No. 7 are similar to those made of the teachers in the District in September, 1955 prior to the enactment of the South Carolina statute approved on the 17th of March, 1956. On information, advice and belief, the inquiries contained in the employment application are consistent with the aforesaid statute, *but substantially the same information had been solicited prior to the enactment of this statute and would have been solicited of applicants had no such statute been enacted.*" (R. 15) (Emphasis supplied.)

Appellants' prayers for relief requested not only injunctions against the enforcement of Act No. 741, but also against the asking of the illegal questions as a prerequisite to employment:

> "3. That this Court enter preliminary and final injunctions restraining defendants from otherwise refusing to continue the employment of plaintiffs solely because of their membership in the National Association for the Advancement of Colored People, or their attitude towards school segregation.

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[1] In 1955 at least some of the appellants completed such a questionnaire under protest while the school term was in session (R. 64).

"4. That this Court enter preliminary and final injunctions restraining defendants from inquiring into plaintiffs' beliefs and associations as a condition of continued employment.

"5. That this Court enter preliminary and final injunctions restraining defendants from refusing to continue the employment of plaintiffs because they have refused to disclose whether or not they are members of the National Association for the Advancement of Colored People or what their attitudes may be towards the integration of the races in the public schools." (R. 10)

The repeal of Act No. 741 does not forbid appellees to ask these constitutionally objectionable questions, nor does it furnish any other relief and the relief prayed for has not otherwise been given.

Act No. 324, 1957, the statute which repealed Act No. 741 also enacted a new prerequisite to employment by the State which indicates that the repeal was in fact illusory:

"Section 1. State, County, and municipal officers, departments, boards and commissions, and all school districts, in this State, shall require applications in writing for employment by them, upon such application forms as they may severally prescribe, which shall include information as to active or honorary membership in or affiliation with all membership associations and organizations." [2]

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[2] Act No. 324's intention is transparent and has been described as an attempt to accomplish by another means the result sought in Act No. 741. See *The State*, Section C, p. 1, April 25, 1957, Columbia, South Carolina.

("GOVERNOR SIGNS NAACP LEGISLATION

"Gov. Timmerman yesterday signed legislation repealing one law and substituting another aimed at barring members of the

This statute has not been invoked in this case and appellants submit that therefore a ruling on its validity is not essential to the disposition of the instant proceedings. But this Court could pass upon its validity now, *Abie State Bank* v. *Bryan*, 282 U. S. 765, 777, 781. Act No. 324 in its attempt to accomplish in veiled fashion the same result overtly sought by Act No. 741 resembles the legislative maneuvers taken by South Carolina following this Court's decision in *Smith* v. *Allwright*, 321 U. S. 649. By eliminating reference to race from the primary election statutes while retaining their requirements in different legal formulations, South Carolina hoped to thwart this Court's rulings. These new statutes were condemned in *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir., 1947), aff'd 333

National Assn. for the Advancement of Colored People from public employment in the state.

"The step makes moot Federal Court action by the NAACP against the 1956 statute.

* * *")

and *The State*, Section A, p. 10, May 7, 1957, Columbia, South Carolina.

("TRUSTEES' ATTENTION CALLED TO LAW ON MEMBERSHIP LISTS

"By the Associated Press

"The South Carolina State Department of Education is calling the attention of school trustees throughout the state to a new law aimed at barring members of the National Association for the Advancement of Colored People from public employment—especially from teaching jobs.

* * *

"There is nothing in the law naming the NAACP, but the general assembly has made it clear that members of the integration-seeking organization are anathema in public jobs.

* * *")

U. S. 875 and *Brown* v. *Baskin*, 80 F. Supp. 1017, aff'd 174 F. 2d 391 (4th Cir., 1949).[3]

Where a change in law does not furnish relief or where power still exists to require acts complained of this Court has held that a case does not become moot. *McGrain* v. *Daugherty*, 273 U. S. 135, 181-182; *United States* v. *Rock Royal Cooperative*, 307 U. S. 533, 555-556; *F. T. C.* v. *Goodyear Tire R. Co.*, 304 U. S. 257, 260; see *Groesbeck* v. *Duluth S.S. & A. R. Co.*, 250 U. S. 607, 609; *Fiswick* v. *United States*, 329 U. S. 211, 220-221. Indeed, in the instant case there is not even the temporary suspension of power which existed in the *McGrain* and *Rock Royal* cases.

As was said in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308-309, where a contested course of conduct was abandoned during the litigation:

> " 'The defendants cannot foreclose those rights nor prevent assertion thereof * * * by any such action as has been taken in this case.' "[4]

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[3] A similar maneuver was employed by South Carolina in *Clark* v. *Flory*, 141 F. Supp. 248 (E. D. S. C., 1956) (upon filing of complaint for desegregating public beach, State closed it). But compare with *Department of Conservation and Development* v. *Tate*, 231 F. 2d 615 (4th Cir., 1956); cert. den. 352 U. S. 838.

[4] The elision in the quotation omits reference to the fact that the government was the plaintiff in that case. But that the nature of the parties is not determinative was established in *Southern P. Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498, 516, where, as in this case, the government was the defendant: "that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions."

Decision following such limited alteration[5] in the legal relationships of the parties is especially appropriate where issues of great public importance are involved. *McGrain* v. *Daugherty, supra.*

None of the cases cited by appellees are apposite, for none deal with an unconstitutional exercise and assertion of power anteceding and surviving a statute which but complemented that power, and was not necessary to it:

Mills v. *Green*, 159 U. S. 651 concerned an election which was concluded before judicial action could affect it; *Board of Flour Inspectors* v. *Glover*, 160 U. S. 170, which merely cites *Mills* v. *Green*, apparently deals with a statute, repeal of which terminated the dispute between the parties; in *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120 it was held that "the plaintiffs do not need any relief, because the act of 1901 accomplishes the result they want"; in *Metzger Motor Car Co.* v. *Parrot*, 233 U. S. 36 the state court's holding that the statute was unconstitutional *ab initio* under the state constitution erased tort liability (and this Court, following the state court reversed). In *Berry* v. *Davis*, 242 U. S. 468, 470 Justice Holmes rested the dismissal on the ground that "All possibility or threat of the operation has disappeared now." In *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, 116 the complainants did "not now need an injunction to prevent the Commission from putting in force bills of lading in the form presented." *Natural Milk Producers Association* v. *City and County of San Francisco*, 317 U. S. 423 was a case in which the appellants had not challenged an exercise of power which was effective after repeal of the ordinance assailed at the outset.

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[5] Compare with *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445, where it was held that "[t]here is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no 'dangerous probability' of their resumption. * * *"

This case should be heard on the appeal and jurisdictional statements filed heretofore by appellants. The substantive questions remaining in the case are essentially the same as when the Notice of Appeal was filed and are "subsidiary question[s] fairly comprised" in the question presented in the Jurisdictional Statement (Rule 15(c)(1)). All of the jurisdictional prerequisites have been fulfilled. As discussed more fully in the Jurisdictional Statement, there has been a denial of injunction by a properly constituted three-judge court as required by 28 U. S. C. § 1253. "The jurisdiction of the District Court so constituted and of this Court upon appeal extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." *Sterling* v. *Constantin*, 287 U. S. 378, 393-394.

There Is No Reason Why Relief Should Not Be Granted.

The motion to dismiss or affirm apparently argues that it is within the unfettered discretion of a district court to deny application for interlocutory injunction. That the exercise of discretion is bound by law is demonstrated in the Jurisdictional Statement where it is shown that it is as much an abuse of discretion to fail to exercise jurisdiction which is given as it is to usurp jurisdiction which does not exist (*Cohens* v. *Virginia*, 6 Wheaton 264, 404; *United States* v. *Corrick*, 298 U. S. 435). Moreover, the argument is made in the motion to dismiss or affirm that an interlocutory injunction will be given only to preserve the status quo. That this is not so is demonstrated in *Board of Supervisors of Louisiana State University* v. *Wilson*, 340 U. S. 909, aff'g 92 F. Supp. 986 (E. D. La., 1950), in which this Court affirmed a judgment awarding an interlocutory injunction ordering the admission of respondent therein to the Law School of Louisiana State University.

The only consequence of Act No. 741's repeal is that even the illusory reasons for denial of relief have been eliminated from the case. There is no longer a statute to be construed by state courts; the so-called administrative remedy granted by the defunct statute has been repealed. Therefore, the questions presented remain justiciable and substantial. Nothing that has occurred herein and no argument of appellees impairs appellants' position taken in the Jurisdictional Statement.

Wherefore for the foregoing reasons appellees' motion to dismiss or affirm should be denied.

Respectfully submitted,

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No. 931. BRYAN ET AL. *v.* AUSTIN, SUPERINTENDENT, SCHOOL DISTRICT NO. 7, ORANGEBURG COUNTY, SOUTH CAROLINA, ET AL. Appeal from the United States District Court for the Eastern District of South Carolina. *Per Curiam:* In view of the repeal of South Carolina Act No. 741 of 1956 by Act No. 324 of 1957 after the decision below, 148 F. Supp. 563, the cause has become moot. Accordingly, the judgment of the District Court is vacated and the case is remanded to it, with leave to the appellants to amend their pleadings either to safeguard any rights that may have accrued to them by virtue of the operation of the repealed Act or to set forth a cause of action based on the operation of the new Act. Rule 15 of the Federal Rules of Civil Procedure. *Thurgood Marshall, Robert L. Carter* and *Jack Greenberg* for appellants. *Robert McC. Figg, Jr.* and *David W. Robinson* for appellees. Reported below: 148 F. Supp. 563.